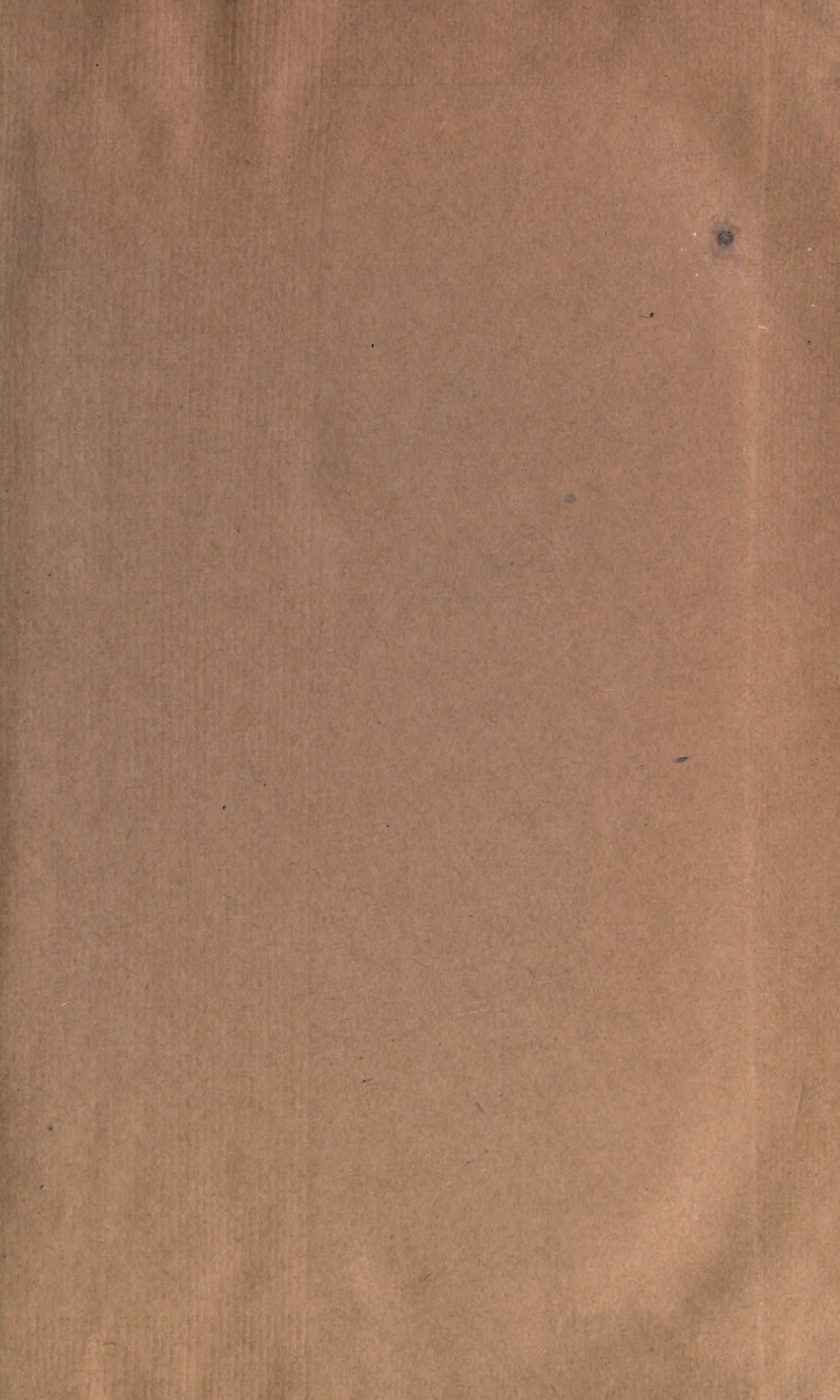




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Pennsylvania. Reports. Supreme Court.
iii

REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

WILLIAM RAWLE, JUN.

WITH NOTES REFERRING TO CASES IN THE SUBSEQUENT REPORTS.

BY

WILLIAM WYNNE WISTER, JUN.,

CONTINUED BY

ELLIS AMES BALLARD.

VOL. III.

PHILADELPHIA.

T. & J. W. JOHNSON & CO.,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS,
No. 535 CHESTNUT STREET.

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JUDGES
OF THE
SUPREME COURT OF PENNSYLVANIA.

JOHN BANNISTER GIBSON,

Chief Justice.

MOLTON C. ROGERS,

CHARLES HUSTON,

JOHN ROSS, Esq., (appointed the 16th
of April, 1830, in the place of JOHN
TOD, Esq., deceased,)

JOHN KENNEDY, Esq., (appointed the
29th November, 1830, in the place
of FREDERICK SMITH, Esq., de-
ceased,)

} Justices.

SAMUEL DOUGLASS, Esq., Attorney-General (appointed Feb-
ruary, 1830.)



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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA

EASTERN DISTRICT—DECEMBER TERM, 1830.

[PHILADELPHIA, JANUARY 10, 1831.]

Vitry for the Use of Vitry *against* Dauci.

The issuing and return of a *scire facias* under the Act of 4th of April, 1798, does not continue the lien of a judgment beyond the period of five years limited by the Act.

The plaintiff must use reasonable diligence in prosecuting the *scire facias* to judgment, by which the lien of the original judgment is continued for another period of five years.

But if an appearance and plea should be entered to the *scire facias*, it seems the plaintiff would be entitled to a liberal share of indulgence, and perhaps the rule of *lis pendens* might be applied.

JUDGMENT was entered in this court of March Term, 1818, against the defendant, and on 2d November, 1820, a *scire facias post annum et diem* was issued upon it, which, on the 6th of November, 1820, was returned "made known." Nothing further was done until 1st January, 1827, when, by order of writing of the plaintiff's attorney, judgment was entered for want of an appearance to the *scire facias*. A *feri facias* was issued to July Term, 1827, which was levied on real estate of the defendant. The property was condemned and sold for \$5000, under a *venditioni exponas*, returnable to December Term, 1827, to Anthony Vitry, to whose use the judgment had been marked.

The question was, whether the issuing of the *scire facias* and the proceedings under it, continued the lien of the judgment ;

[Vitry for the use of Vitry v. Daucl.]

which was disputed by creditors, claiming under mortgages executed in April and May, 1819.

Keemle, for the purchaser, observed, that the object of the [*10] act of 4th of April, 1798, *Purd. Dig.* 420, (New Ed.) as declared in the preamble, was, to prevent the evil and inconvenience to purchasers of real estate, by suffering judgments to remain a lien for an indefinite length of time without process to continue or revive the same, the previous legislative provisions for that purpose having proved ineffectual. The indefinite continuance of the lien of judgments was the evil, and the remedy proposed, was process to continue or revive them. The act contemplates the same sort of process, namely a *scire facias*, both for the continuance and the revival of a judgment. If, therefore, the kind of process indicated has been resorted to for either purpose, the case is within the statute. In the first section provision is made for judgments then in existence. The second section, which embraces this case, relates to judgments thereafter to be entered, and declares that they shall continue a lien no longer than five years, unless within that period a *scire facias* be sued out to revive the same. All that is necessary, therefore, in order to revive a judgment, is to sue out a *scire facias* within the time prescribed. The very words of the statute require nothing more, where the object is merely to continue the lien. When it is to have execution, a judgment must be entered on the *scire facias*. When a *scire facias* is once issued, it is the same in effect as if it were issued every term, for it is continued from term to term. A *scire facias* is in the nature of an original action, and the defendant may plead to it. *Commonwealth v. M'Kisson*, 13 *Serg. & Rawle*, 148. If a plea be entered and the case goes on in regular course to trial, more than five years may elapse before judgment can be obtained: it certainly never could have been intended, that in such a case the lien should become extinct. The legislature did not mean, that at all events, judgment should be obtained within five years; all they did and all they could require, was, that a *scire facias* should be sued out that it might appear of record, that the judgment was not satisfied. To have required more would have been unjust, for whether a judgment can be obtained within five years must often depend on events, which the plaintiff cannot control. In *Pennock v. Hart*, 8 *Serg. & Rawle*, 380, the court said, that the entry of contingencies is so purely a matter of form, that they are never entered at all. In this we go beyond the English practice, which requires them to be actually entered, though they may be entered at any time. The English practice of considering a *scire facias post annum et diem* discontinued

[Vitry for the use of Vitry v. Dauci.]

after a year and a day, if the plaintiff do not proceed on it within that term, does not hold here. *Davis v. Jones*, 12 Serg. & Rawle, 60. It has been the uniform understanding that the issuing of a *scire facias* continues the lien of a judgment, without a judgment on the *scire facias*. The question here is not raised by purchasers, mortgagees, or judgment creditors, who after the expiration of the five years, on searching the records, and finding the judgment not revived within that term, lend their money upon the faith of that fact, but by mortgagees, who have lain by, without proceeding on their mortgages, until the plaintiff has sold the property, and then attempt by availing themselves of supposed legal advantage, *to reap the fruits of his labours; [*11] such a proceeding is not to be favoured. The act of assembly is in its nature an act of limitations, restricting the lien of a judgment, which before was indefinite; and as the suing out a writ prevents the statute from running, so the issuing a *scire facias* prevents the five years from running against the judgment. This act should receive, and always has received a liberal construction, to which our opponents are indebted for being permitted to come in under it at all; for it speaks of purchasers only. The only object which the legislature had in view, was to give notice that the judgment was unsatisfied, and this is effectually done by taking out a *scire facias*. The cases of *Young v. Taylor*, 2 Binn. 218-229; *Pennock v. Hart*, 8 Serg. & Rawle, 380; *Black v. Dobson*, 11 Serg. & Rawle, 94; *Commonwealth v. McKisson*, 13 Serg. & Rawle, 148, appear to be decisive of the question. The act of 26th March, 1827, Pam. L. 129, which provides that the issuing of a *scire facias* either with or without entry of judgment thereon shall not have the effect of continuing the lien of a judgment for a longer period than five years from the day on which such a *scire facias* issued, shows the legislative construction of the pre-existing law on the subject.

J. Randall and Phillips, contra. The question raised by the motion before the court, depends upon the true construction of the act of 4th April, 1798, and is of the first impression. It is whether a plaintiff who has obtained a judgment, may by merely issuing a *scire facias* and lying by, continue the lien of his judgment as long as he thinks proper. In giving a construction to the act, the opposite counsel advert to the evil for which a remedy was to be afforded, and not to the remedy itself. It is the remedy which is to be looked to, to discover the will of the legislature, though the evil to which it was intended to be applied, is to be taken into view in order to come at their meaning. Now the will of the legislature is expressly declared, as to the remedy, and in terms limits the duration of a judgment, as a lien upon

[Vitry for the use of Vitry v. Dauci.]

land, to five years. No argument drawn from the character of the evil can countervail the intention of the legislature thus clearly expressed. This is not merely the language, but the spirit of the act; if the mere issuing a *scire facias* has the effect of converting a definite into an indefinite lien, it is a violation of the whole spirit of the act. The question is, whether the plaintiff, by his laches shall have a greater advantage than he would have enjoyed, if he had pursued the directions of the act. The act points out a particular mode of proceeding; if he had pursued it, his lien would have been gone. Can he better his situation by disregarding the law? With the exception of the case of *Young v. Taylor*, and the cases founded upon it, there has been in this court as well as in the legislature an uniform opposition to indefinite liens. In *Cowden v. Brady*, 8 Serg. & Rawle, 505, it is held that the lien of a *test fieri facias* continues only while it is diligently pursued, and unless the whole spirit of the decision and the reasoning of the court be disregarded, it decides the present question. The case of *Pennock v. Hart*, which establishes the position that the *five years are to be computed from the expiration of a *cesset executio*, has been thought to have gone too far, and the case of *Black v. Dobson*, 11 Serg. & Rawle, 94, and *Bombay v. Boyer*, 14 Serg. & Rawle, 255, restrain that decision to cases in which the *cesset* appears clearly on the record. So too the death of the debtor within the five years does not prevent the lien of a judgment from expiring at the end of that period, if it be not duly revived. *Fryhoffer v. Busby*, 17 Serg. & Rawle, 121. Nor does the issuing of an execution within a year and a day, and levying it on personal property, continue the lien of a judgment beyond the five years. *Betz's Appeal*, 1 Penn. Rep. 271. The act of March 26, 1827, is not to be considered as expressive of the legislative opinion, that the law was different before, for nothing is more common than the passage of an act to remove any doubt which may be supposed to exist. Acts, too, merely declaratory of the law, are frequent both in England and this country, and are very useful. The act of 1827 is clearly declaratory, at least in parts, though in other parts, it is remedial. The legislature could not anticipate what would be the decision of the Supreme Court in future cases, and therefore declared what the law ought to be.

The omission to serve the *scire facias* on the mortgagees was fatal to the judgment. The object of the legislature was to give complete notice to those who were interested in the land, of the continuance of the lien, and therefore the *scire facias* is directed to be served on the terre tenants, and on the defendant, or his feoffee or feoffees. Every one interested in the real estate bound by the judgment, who can receive notice, is entitled to it. A mort-

[Vitry for the use of Vitry v. Dauci.]

gagee is an alienee or purchaser, and comes within the meaning of the term feoffee as used in the act, for feoffments, properly speaking, are unknown in Pennsylvania. *Bank of North America v. Fitzsimons*, 3 Binn. 342; *Chahoon v. Hollenback*, 16 Serg. & Rawle, 425.

The opinion of the court was delivered by

GIBSON, C. J.—Being unshackled by danger of disturbing titles, it is our duty to interpret the statute according to its obvious intent. To ascertain the object which the legislature designed to accomplish, we must look to the mischief and the remedy. Debtors have been prejudiced, and purchasers perplexed by neglect of judgment creditors to enter satisfaction of record when actually obtained; and the legislature interfered so far as to command the creditor to acknowledge satisfaction within a specified period after request made. This remedy being found inadequate, and the legislature declaring that the provision theretofore “made for preventing the risk and inconvenience to purchasers of real estate by suffering judgments to remain an indefinite time without any process to continue or revive the same, hath not been effectual;” do what? Direct the party to give notice by process of *scire facias*, or execution according to the stat. Westm. 2? Not at all. Had that been the sum of the matter, they would have stopped short with the first section, which declares that no judgment *shall be a lien for more [*13] than five years, unless the plaintiff, within that time, sue out a *scire facias* to revive it: instead of which, there is in the succeeding sections a mandate that the writ be pursued to judgment, the form of which is directed to be, not that the plaintiff have execution, but that the original judgment be revived for another term of five years. The renewal of the lien, therefore, is by virtue of the judgment of the court, the old lien continuing in the meantime, at least to give the plaintiff a reasonable opportunity to prosecute his writ to its consummation. We are not going to say that nothing less than a judgment formally pronounced will be available. On the contrary, we have held a judgment by consent in an amicable *scire facias*, to be a compliance with the spirit of the law; and there would be little difficulty in maintaining that any confession or agreement that the lien endure for the specified period, is within its purview.

Now in directing the mode of proceeding, and the form of the judgment, the legislature evidently contemplated something more than the bare issuing and returning of the writ. The object was to furnish record notice to purchasers, by compelling the judgment creditor to obtain a judicial recognition of his lien, at least once in every successive period of five years. The

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design was not to suspend the presumption of payment, which arises from lapse of time, but to make it conclusive, if not rebutted within the specified period, by judicial decision or something equivalent. No information would be derived by a purchaser, from a *scire facias* returned, but not prosecuted at the end of, say, eighteen years. In fact the presumption would be stronger than if no writ had been issued, inasmuch as the creditor, having taken a step towards the end of the law, would be less likely to stop short without having obtained satisfaction, than one who had manifested no disposition to stir in the matter at all. Judgments on which executions had issued, were in fact more frequently satisfied, than those on which the creditor had reposed as a security. An unsatisfied execution was never suffered to remain in the sheriff's hands; but after satisfaction had, the creditor never took the trouble to have the writ returned. Would there not be an equal probability of payment, where any other judicial writ had been returned, but apparently abandoned? The natural presumption of the law is, that every judgment is satisfied within a year and a day. The same presumption is applicable to a *scire facias* under the stat. Westm. 2, which is not an original action, but process to continue and have execution of the judgment, (2 Sellon's Pr. 175,) and this species of *scire facias* also becomes a nullity if it be not prosecuted within the year and a day, (Id. 277.) In conformity to long practice, we have held that the party, here, is not necessarily, as in England, driven to a new writ; but process thus delayed has never been supposed to prevent the presumption from lapse of time, from running in favour of purchasers. Certainly the legislature has not said that the return of a *scire facias* shall be notice; and it would have let in the very mischief [*14] intended to be prevented, if it had. The object in view was to protect purchasers from stale incumbrances, and the means of accomplishment was to make the existence of the lien, a matter of judicial ascertainment in successive periods of five years. But according to the construction contended for, this might be evaded and the matter left as it stood, by a mere turn of the hand. The judgment creditor would have nothing to do, but take the first step, which, according to the argument, would entitle him to a dispensation from all the succeeding ones. Surely the return of a *scire facias* was never intended to be an equivalent for the periodical revivals, which are plainly enjoined; nor the negligence of the creditor, to place him on more advantageous ground than if he had complied with all the requirements of the law.

The lien then may be lost by negligence; and a case like the present seems to be a fair subject for the principle of *Cowden v*

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Brady, (8 Serg. & Rawle, 505,) where the lien of a testatum execution, which, like that claimed for this *scire facias*, would else have been interminable, was lost by neglect of reasonable pursuit. Where there has been an appearance and plea, it may be difficult to lay down a rule applicable to all cases; and it would be improper to attempt it here. Yet it may safely be affirmed that the plaintiff will be entitled to a liberal share of indulgence: possibly the rule of *lis pendens* may be applied with decisive effect. That, however, is not the case before us. The original judgment was entered of March Term, 1818, and on the *scire facias*, which was returnable to December Term, 1820, judgment might have been signed at March Term, 1821; instead of which, it was, for no apparent cause, delayed till 1827—the expiration of a period beyond that, for which the lien would have endured had it been revived at the regular time. What could a purchaser possibly infer from this backwardness of the plaintiff to avail himself of an advantage so palpably within his reach, but that satisfaction had been obtained? The delay was gross negligence; and if the lien would be gone as to purchasers, it is equally gone as to intermediate incumbrancers. We are of opinion, therefore, that the judgment be postponed.

Cited by Counsel, 5 R. 252; 5 W. 163; 9 W. 304; 1 W. & S. 300; 2 W. & S. 220, 257; 3 W. & S. 351; 1 J. 111; 1 Wr. 264; 10 N. 445, 446; 7 O. 240; 5 W. N. C. 184; 8 W. N. C. 247.

Cited by the Court, 4 W. 344; 7 W. 188; 7 Barr, 134; 1 Wr. 266; 1 S. 209; Bald. 275; 31 S. 492; s. c. 2 W. N. C. 628; 7 O. 241.

This case decides that there must be due diligence in prosecuting a *scire facias* to revive a judgment, or the lien will be gone: 7 W. 188; and it was further held that in the case before the court there had been gross negligence: 4 N. 344. But it did not decide that a *scire facias* to revive is considered abandoned if not prosecuted within a year and a day: 1 Wr. 266; although it was so quoted by Chief Justice GIBSON in 7 Barr, 134. In 1 Wr. 266, the authorities are reviewed, and the principal case relied on for the decision that an *alias scire facias*, if issued within five years of the original, is in time.

*[PHILADELPHIA, JANUARY 10, 1831.]

[*15]

The Case of Barnet's Appeal.

Where a paper contains the substance of a will, with the usual act of execution subjoined, though without the names of subscribing witnesses, the fact that it has been thus found in the decedent's possession, ought, without actual publication, to be taken for *prima facie* evidence of its having been adopted as a testamentary act.

Where, on the other hand, it is destitute of every formal act of authentication, the presumption ought to be adverse, in the absence of proof of actual publication, or any other act of recognition equally satisfactory.

[The Case of Barnet's Appeal.]

Where a paper was headed, "My last will and testament, &c." the face of which was blotted and blurred, and indicated the first essay of a mind untrained to method and arrangement, in which whole sentences were obliterated, and entire passages cut off, crossed out, and repeated with material variations, in addition to which the decedent began anew on a fresh leaf, to make, not a fair copy of what preceded it, but an entirely new draft varying from it in essential particulars, and this was left unfinished, it was held that it contained no sufficient intrinsic evidence of a testamentary intention, to entitle it to be admitted to probate as a will.

Though a rough draft may be a testament, where the intent is clearly apparent, yet it is otherwise if it appear that the decedent viewed it as a mere outline to be filled up and completed by more detailed provisions; or that having viewed it at one time as complete, he had cancelled it, and used it as a memorandum for a new disposition.

THIS was an appeal from the decision of the Circuit Court of Northampton county, held by Rogers, Justice, in March, 1830, reversing the decision of the Register's Court of that county, as respects their refusal to admit to probate, a paper writing dated the 7th of April, 1820, offered as the last will and testament of William Barnet, deceased.

William Barnet, the elder, having died on the 7th of August, 1829, two papers were, on the 11th of the same month, presented to the Register of Northampton County for probate, as his last will and testament.

The first of these papers was as follows, viz. :

"Easton, April 7th, 1820.

"My last will and testament, &c.

"I do appoint Thomas M'Keen and my son William, my executors, to perform all matters herein mentioned, that is to say, I give to my son George one dollar, and no more. I give to my son Henry five hundred dollars, and no more. *I give to Sarah, the daughter of George Barnet, (currier,) five hundred dollars, which is to be kept on interest, well secured, till she becomes to the age of twenty-one years, if she should so long live, if not, the same to be divited equal among the following: William, Samuel, Elizabeth, Susan, Aaron, David, and Edward. All my estate is to be divitted perfect equal amongst the last named children, the debts in my book against Wm. and Samuel to be deducted.*"

The lines in italics had lines drawn through them with a pen.

Then came the following lines, which were crossed out with a pen, viz. :

[*16] *"*My house and all the lot and tanyard, Tables, Burrows, curing knives, fleshers, worker, and in fact all the tools necessary to carry on the business, to be appraised by these men and them to be chosen by Thomas M'Keen, and whatever amount it may be, David and Edward are to have the refusal of*

[The Case of Barnet's Appeal.]

the same. My household furniture, bedding, book, &c., I shuld like very mutch if the last named children wold devide equal and farely amongst themselves such of it as they may think proper to devide. I give to Wm. and Samuel my pistols, sword and epoulets, they devide as well as they see proper. I give to Edward my watch, if I own one at the time. I further appoint Thomas M'Keen a guardian for my minor childorn, That is to say, Aaron, David and Edward."

The same paper also contained the following words, viz. :

"My house and all the lot it stands on, the Tanyard incluted, and all other buildings thereon, the Tanyard tools and currin Tools and Table, weal Barrows, currin knives, Fles workers, and in fact all the tools that's necessary to carey on the buisseness of tanning and curring, to be apraset by three men, and them to be chosen by Thomas M'Keen, David and Edward to have the refusal of the same.

"My household furniture, Beding, Books, and the Gig, pistols and sword, appelets, incluted, to be devided in seven lots, as equal as possible, and valuation put on in proportion of each lot, then Wm. Saml. Elizah. Susan, Aaron, David and Edward to draw lots for the same. The leather on hand is to be tanned out and sold to the best advantage, one-thirt of the proceets is to be returnet to my executors. My teen acor lot to be devited in three parts, and valuation put on them, the last named childer to make choise."

The other paper was as follows, viz. :—

"This my last will and Testament.

"I do apoint Thos. M'Keen and my son David executors to perform all matters herein mentioned, that is to say, I give to my son George one dollar and no more. I give to my son Henry five hundred dollars and no more. My house and lot, Tanyard, and all other buildings thereon, the Grindstones, curring Kniefs, Fleshers, Tables, weal Barrows, in fact all the tools in the yard or about, of whatsoever description they may be, shall be together as one lot, at the rate of Five hundred dollars, David and Edward are to have it in part of there."

When these papers were presented to the Register, John Barnet and Samuel Bittenbender appeared before him and made affidavit that on the day of the decease of the above named William Barnet, and shortly after his death, at the request of William Barnet, Jr., and David Barnet, sons of the said deceased, they took his keys and proceeded to examine his papers, &c. That upon unlocking his secretary they found in it the two paper writings above referred to ; That they are well acquainted

[The Case of *Barnet's Appeal.*]

[*17] with his handwriting, having frequently *seen him write, and that they believed both the said paper writings to be in his handwriting: that they had been well acquainted with him for more than twenty years previous to his decease, and that from their first acquaintance with him up to the day of his death, he was of sound disposing mind, memory and understanding, according to the best of their knowledge, observation, and belief.

On the 12th August, 1829, letters testamentary were granted on the two papers, to Thomas M'Keen and David Barnet; William Barnet, who was named as executor in the first paper, having filed in the Register's office a paper in which he declared that he did not consider himself an executor, and that if he was, he wished that to be considered as his renunciation.

George Barnet, the eldest son of William Barnet, deceased, entered an appeal to the Register's Court from the decision of the Register admitting to probate the said two paper writings, as the last will and testament of the said William Barnet, deceased, and granting letters testamentary thereon.

Before the Register's Court, which was held on the 28th November, 1829, John Barnet, a witness called by the appellees, testified, among other things, that after returning from the funeral of the deceased to his late residence, David Barnet, William Barnet, Samuel Bittenbender and the witness went up stairs, when David and William Barnet brought out two small portable desks, and set them on the table: that they were unlocked in the presence of the persons above mentioned, and the two papers then exhibited, and which the witness identified, were found in one of the desks: that they examined only the two papers admitted to probate, and thinking it would be too much trouble to examine all the papers contained in the desks, they agreed to lock up all the papers in them and deposit them in the bank, which they did: that on the following Monday morning, on being requested to do so, they called at the bank, got the two papers in question, and took them to Mr. Porter's office, who drew the form of probate, which they took to the Register's office: that the witness had known the deceased, who was his uncle, upwards of thirty years: that both the papers were, in every part of them, in the handwriting of the deceased, who, in the opinion of the witness, was from his earliest acquaintance with him, to the day of his death, of sound and disposing mind and memory. That after the decease of Henry Barnet, the son of the said William Barnet, deceased, William, Jr., returned from Lancaster, and brought with him a copy of Henry's will, who had given everything to his wife and her niece: that the witness asked the elder William Barnet whether he had ever intended letting Henry have anything, to which he answered that he

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had, and that the last time Henry was in Easton he had asked him the question, and he had then told him he had intended to leave him, but made no mention of any amount, and then added, "All I had to do, is to alter mine:" that the witness was not confident *that he added the word "mine," and did [*18] not recollect his using the word "will."

On being cross-examined, the witness stated that the deceased was married three times. By his first wife he had three children, one of whom died young. George, the eldest, and Henry, the next, grew up. George was still living, and Henry died in Lancaster, without children. The second and third wives of the deceased, were sisters. By the second he had eight children. The eldest, a daughter, named Catharine, died young. The second, William, died after his father. The third, Samuel, died before his father. The fourth, Eliza, was still living, as was also the fifth, Susan. The sixth, Aaron, died before his father. The seventh, David, and the eighth, Edward, were still living. By the third wife he had no children, Edward had gone off a short time before his father's death, and it was understood in the family, though not then certainly known, that he had enlisted. It afterwards proved that he had.

The witness was further cross-examined, was re-examined and cross-examined a second time, but stated no facts which are deemed material, except those above stated.

The evidence of Samuel Bittenbender, another witness examined on the part of the appellees, was substantially the same as that of the preceding witness.

Sarah Shaffer, a witness also produced by the appellee, declared, that she lived in the family of William Barnet, Jr., and old Major Barnet boarded there: that about a year before the hearing, he was plaguing her about making a garden, when she told him he should leave her a lot, and then she could keep a garden as long as she lived; to which he replied, his will was made. There was nothing either serious or joking in the matter.

Isaac Levan was also examined as a witness on the part of the appellees. His evidence in the material points corresponded with that of the first two witnesses, and he also stated some circumstances connected with the deceased having been left out of the direction of the Bank and the Bridge Company, from which he inferred, that the deceased at the time of his death, and for several years before, was not as well disposed towards Col. M'Keen, as he had previously been.

On the part of the appellant, Philip H. Mattis, Esq., was produced as a witness, who testified, that he had been well acquainted with William Barnet the elder, deceased, within the

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last few years : that on several occasions he had heard him express himself in terms, which indicated anything but friendship towards Thomas M'Keen, Esq., and had expressed himself in terms of hostility, since he had been left out of the direction of the Eastern Bank : that George Barnet, the son of the deceased, had a daughter : that he never heard the deceased express himself favourably or unfavourably with respect to his son George for some years past : that some six or eight years ago the deceased said he wished to consult the witness about drawing his will, intimating, though not expressly declaring, that it was [*19] on *account of his son George's situation, that he wished to make a will : that this occurred about the time George's property was sold by the sheriff, and bought by the old man, though he could not be positive as to the time : that the deceased concluded by saying, he would draw up a rough sketch of his will some day, and show it to the witness, that he might put it in form. He said he wished his opinion on it, but never intimated to him what kind of an arrangement he wished to make. Several years afterwards he spoke again to the witness on the same subject, and to the same effect. The last conversation was about four or five years before his death. In the second conversation, he spoke of drawing up a rough sketch as a thing to be done, and the witness thought he stated that he had drawn up a rough draft before, but that it did not then suit him, and he wanted to alter it. The last conversation the witness was certain was subsequent to the sale of George's property by the sheriff. From the course of the first conversation, the witness inferred that he was not on good terms with his son George. In several conversations, the deceased appeared to express considerable interest in Charles L. Eberle, who married his son George's only child, and appeared anxious to obtain for him the situation of Deputy Register, and of Post Master, as successor of the witness, who it was expected would resign that office. The application in relation to the Post Office was in November or December, 1827.

The appellant then gave in evidence the records of the Court of Common Pleas of Northampton county, showing that the *venditioni exponas*, under which the estate of George Barnet was sold, issued on the 12th of May, 1821.

After full hearing and deliberation, the Register's Court reversed the decision of the Register, and decided that William Barnet died intestate ; whereupon the persons named as executors in the alleged will appealed to the Circuit Court.

The Circuit Court reversed the decision of the Register's Court as respects their refusal to admit to probate the paper writing dated the 7th of April, 1820, and decreed that so much of said

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paper dated as aforesaid, as is not crossed and erased, is the last will and testament of the said William Barnet, deceased, and ordered it to be admitted to probate as such, and affirmed the remainder of the decision of the Register's Court, as to the paper without date, headed "This my last will and testament, &c."

From the decree of the Circuit Court, George Barnet, the eldest son of the deceased William Barnet, entered an appeal to the Supreme Court, for which he assigned the following reasons, viz.:

First. The Circuit Court should have affirmed the entire decree of the Register's Court.

Second. There is no sufficient evidence of a testamentary intention connected with the said paper, dated April 7th, 1820, in the decree of the Circuit Court mentioned, to establish it or any part of it *as the last will and testament of William Barnet the elder, deceased, but there is sufficient evidence to [*20] the contrary.

Third. The said paper is an unexecuted and merely inchoate act or instrument, unsupported by evidence of publication as a will.

Brooke and Jones for the appellant.

J. M. Porter and J. Sergeant for the appellees.

The opinion of the court was delivered by

GIBSON, C. J.—The few precedents in cases like the present to be found in the books, afford still fewer principles of general application, and individual cases must therefore stand in some degree on their peculiar circumstances. It seems that nothing has been settled as universally true, but that the *animus testandi* must have been present. But it is to ascertain its presence, that determinate principles to interpret the decedent's acts, are necessary. The certain, and, for the most part, equitable disposition of the law, ought not to be superceded but by a disposition of the decedent, manifested by acts which indicate his intention with reasonable and convenient certainty. Where the paper contains the substance of a will with the usual act of execution subjoined, although without the names of subscribing witnesses, the fact that it was thus found in the decedent's possession, ought, without actual publication, to be taken for *prima facie* evidence of its having been adopted as a testamentary act. Where, on the other hand, it is destitute of every formal act of authentication, the presumption ought to be adverse in the absence of proof of actual publication or any other act of recognition equally satisfactory. In substance, this distinction seems

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now to be adopted by the Judges of the English Ecclesiastical Courts, by whom the omission to perfect an instrument which carries with it intrinsic evidence of a design to superadd an act of authentication which the decedent has not been prevented from executing by sudden death, is referred to a change of intention; so that it is not every scrap of paper containing a disposition made in contemplation of death, that is received as testamentary. (1 Roberts on Wills, ch. 1, § 17.) The distinction is a wholesome one, for no prudent man would venture to put pen to paper in digesting any testamentary plan, if a rude sketch were received as evidence of what is usually the last, most solemn, deliberate, and perhaps important act of his life. It was on the principle I have indicated, that Plumstead's Appeal was determined. Two parcels of bonds and securities bearing on the envelope of each respectively the words "For Rebecca Hutton," and "For the heirs of George Plumstead," were found in a box which had been kept in the possession of the decedent till her death. No one doubted that these indorsements were memoranda of an intended testamentary disposition; but having neither shape nor feature of a testamentary act, they were not admitted to probate. (4 Serg. & Rawle, 545.) The case of *Arndtt v. Arndtt*, 1 Serg. & Rawle, 256, seems to be easily distinguishable. There the paper contained all the requisites of a will when it was exhibited as such to Mr. Trail; and an [*21] *after intention to correct it, so as to obviate discrepancies then pointed out, would not make it the less so in the meantime, inasmuch as actual cancellation, and not merely a purpose to cancel, amounts to a revocation (*Burns v. Burns*, 4 Serg. & Rawle, 295.) This is conclusively true in respect of a will formally executed; and it is not easy to say why it should not be so in respect of a will which, though destitute of the usual formalities, is nevertheless conceded to have been a will at the time. That it was so, I am unable to doubt; for the delivery of a paper which contains the essential parts of a will, to a scrivener to put it in form, can no more invalidate it as a testamentary act, than could the delivery of a will already in due form, to be fairly copied. It seems then that the defect in the argument of Mr. Justice Yeates, was in treating the intention to correct inconsistencies, as evidence that the paper never had been the decedent's will, when the intention was evidently only to revoke it *pro tanto*. From expressions of the other judges, it might seem that the paper contained even the formal parts of a will; and the inference from these, is strengthened by the fact that no objection was made, that the evidence of publication which, in the absence of intrinsic evidence of actual adoption, would have been the life-giving circumstance, rested on the credibility of but one

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witness. Notwithstanding the dissenting opinion of Mr. Justice Yeates, for whose judgment and experience we, in common with the profession, entertain great respect, I am unable to refuse an unqualified assent to the propriety of that decision. The case at bar seems to be essentially different. Not only are the introductory words, "This is my will," coupled with an *et cetera* which indicates an intention subsequently to prefix a more full and formal expression as evidence of the act of adoption, but the face of the paper is blotted and blurred just as we might expect to find the first essay of a mind untrained to method and arrangement. Interlineation on interlineation is crowded into the spaces between the lines, till the manuscript is, in places, scarcely legible. Whole sentences are obliterated, and entire passages cut off, crossed out, and repeated with material variations; in addition to which, the decedent begins anew on a fresh leaf, to make, not a fair copy of what preceded it, but an entirely new draft, varying from it in essential particulars; and even this is left unfinished from inability, no doubt, to arrive at a satisfactory conclusion. The nature of this last attempt, may be inferred from its abandonment, which would hardly have ensued, had the object been a fair copy or even a more formal disposition according to a plan already matured; and that it was neither, is further apparent from the variance. This remark would be inapplicable, were the second paper viewed as an attempt to revoke. Yet were the first admitted to have been, at any time, a valid testamentary act, the cutting of it up into memoranda for an entirely new disposition, would be a revocation by actual cancellation. I take it, then, that the paper contains no sufficient intrinsic evidence of a testamentary *intention; [*22] and this leads to a consideration of the evidence *dehors*.

On the part of the appellees, it was proved that the decedent, being told of the death of a son, intimated an intention to change the disposition of his property; but whether this was predicated of a disposition already evidenced by a testamentary act, or one only contemplated, does not sufficiently appear. Again, in reply to a female acquaintance who had jocularly hinted at a devise of one of his lots, he said his will was already made. This, however, seems to have been intended to parry the request; and it would be unsafe to adjudicate on the evidence of declarations in the course of a conversation that called for nothing like a serious expression of the fact. On the other hand, he had become inimical to one of the persons named in the alleged will as his executors. This, however, would tend to prove a change of purpose, rather than that he had not adopted the paper at all. But subsequent to the making of the writing, he told another witness that he would draw up a rough sketch of his will,

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and submit it to him to put it into form; that he wanted to have his opinion on it, but did not intimate what disposition he desired to make; and that in a conversation still later, he spoke of the rough sketch as remaining yet to be made, saying that he had drawn up a rough draft before, but that it did not suit him now. In this, it is evident, he alluded to the paper in controversy; and although even a rough draft may be a testament where the necessary intent is clearly apparent, yet the natural deduction from the evidence here, is that the decedent viewed it as a mere outline to be filled up and completed by more detailed provisions; or that having viewed it as at one time complete, he had cancelled it, and used it as memoranda for a new disposition, and this latter inference is powerfully corroborated by the intrinsic evidence of the paper itself. Nothing decisive, then, is proved by the extrinsic evidence, the tendency of which is only to strengthen the inference from the face of the paper. We are of opinion, therefore, that the writing has not been established as the testament of the decedent, and that it ought not to be admitted to probate.

Judgment of the Circuit Court reversed, and the judgment of the Register's Court affirmed.

Cited by the Court, 6 W. 356; 2 C. 209.

[*23]

*[PHILADELPHIA, JANUARY 10, 1831.]

Borrekins against Bevan and Porter.

IN ERROR.

In all sales of goods there is an implied warranty, that the article delivered shall correspond in specie with the commodity sold, unless there are facts and circumstances to show that the purchaser took upon himself the risk of determining not only the quality of the article, but the kind he purchased.

Therefore if the defendant sell, and the plaintiff purchase an article as blue paint, and it is so described in the bill of parcels, this amounts to a warranty, that the article delivered shall be blue paint, and not a different article.

In order to sustain an action on an implied warranty in a contract for the sale of goods, it is not necessary that the plaintiff should, before bringing suit, redeliver or tender the article to the defendant.

THIS was a writ of error to the District Court for the city and county of *Philadelphia* in a suit brought by the plaintiff in error, Henry P. Borrekens against the defendants in error, Mathew L. Bevan and William Porter, trading under the firm of Bevan and Porter, to recover damages on an implied warranty in the sale of an article as blue paint.

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On the trial of the cause before Judge Hallowell in the court below, on the 11th of October, 1826, it appeared in evidence that the defendants, on or about the 1st May, 1820, sold to the plaintiff four casks of paints, and rendered to him a bill of parcels, of which the following is a copy, viz. :—

Mr. H. P. Borrekins,		Philad. May 1, 1820.	
		Bought of Bevan and Porter,	
4 casks paint, viz. :			
1 cask blue,	wt.	5. 0. 23	
	tare,	2.	
		<hr/>	
		4. 2. 23, is 527 lbs. a 50 cts. 263.50	
1 do. green,	"	3. 2. 4	
	tare,	2.	
		<hr/>	
		3. 0. 4 is 340 lbs. a 25 cts. 85.—	
1 do. do.	"	5. 3. 3	
	tare,	2.	
		<hr/>	
		5. 1. 3 is 591 lbs. a 12½ cts. 73.87	
1. do. yellow,	"	6. 1. 19,	
	tare,	2.	
		<hr/>	
		5. 3. 19, is 663 lbs. a 1-100 6.63	
		<hr/>	
Credit, 4, 6, and 8 months,		Dollars, 429.	
		<hr/>	

*The plaintiff, thereupon, gave to the defendants his three promissory notes for the price payable in four, [*24] six, and eight months, which were paid as they respectively became due.

The plaintiff examined as a witness on his behalf, Isaac W. Blanchard, who testified as follows: "I was not present at the purchase by Mr. Borrekins. I believe it was made at the defendants' counting-house. The articles described in the bill of parcels were bought and carried to the manufactory. Some time, very near a twelvemonth afterwards, Mr. Borrekins brought a sample of this stuff (pointing to the specimen presented to him by the plaintiff's counsel,) and directed me to go down to Messrs. Bevan and Porter. It was about March or April, I went, and I stated to Mr. Bevan, that Mr. Borrekins claimed the money paid because that article was not according to sample; I exhibited a sample to the defendants, and told Mr. Bevan, that that was a sample of the blue, which Borrekins had purchased of him. Mr. Bevan took a little in his hand, and

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said, 'This is not blue; it does not look as if it even had been blue.' He then stated, that there would be no difficulty about settling it: that Mr. Humphreys was not then in the city, but was expected shortly, and that then there was no doubt the matter would be adjusted amicably. Mr. Borrekens brought the sample, and showed it to me. I know that the cask remains there yet at the manufactory. My business did not lead to the manufactory; it led to the store." On his cross-examination the witness said, "The sample Borrekens showed me at the time of making the purchase was verditer blue."

George Wood, another witness called by the plaintiff, testified thus: "This article (pointing to the specimen exhibited to the preceding witness) was sent to me, and I received it as foreman of Mr. Borrekens' factory. I received it at the latter end of 1820, as near as I can recollect. I received it with a cask of green; nothing else that I recollect. I do not know what that article (pointing as before,) is. It is not paint. I recollect only receiving the two casks, one blue, the other green. I saw a sample of this before I received the paint. The sample was a good article. It was sent for me to try if it was good. The sample was sent by Mr. Borrekens. I have tried this since. I could not do anything with it. I judged of the sample by the looks; it looked very well; it did not look like this. I opened the cask myself. This is a fair sample of what the cask contains. I opened the cask about six or eight weeks after I received it." Being cross-examined, he said, "It ran generally through the cask like this. The sample which I saw had all the appearance of being good verditer. This blue paint does not injure by keeping."

James Kearney, being then called as a witness for the plaintiff, swore as follows: "I was at that time a workman in Borrekens' factory. The cask of paint was received about the latter end of 1820. We tried it; I cannot tell when, perhaps six or eight weeks after we received the cask. I rather think a cask of green was received at the same time. I cannot recollect whether any others about the same time. We had not received [*25] any other cask of blue for some *time before, as I recollect. I do not recollect the purchase of any other cask of blue by Mr. Borrekens, at any time." On his cross-examination he said, "We used blue paint in the factory: we generally made the blue paint."

Isaac W. Blanchard, being again called, said: "Mr. Borrekens used exclusively Prussian blue. He made all he used. Mr. Borrekens did not purchase any blue paint excepting this, while he was in business. The verditer blue which this is, is a different article from the Prussian. This is the only cask of

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such stuff in our factory. An account of stock has been taken every year, and this is the identical cask." On his cross-examination the witness said: "Borrekins never used verditer blue in his factory. It was a very scarce article. He used the Prussian blue. He could not obtain the verditer of a quality sufficiently good. Some verditer will not work in water, but will in oil. I do not recollect making trial of the verditer. The other witnesses are mistaken as to its being the latter end of the year."

Henry Troth, another witness examined on the part of the plaintiff, said: "I have been accustomed to deal in paints, and verditer among the rest. I am something of a judge. This (pointing to the specimen before referred to,) might be called blue paint, but it does not resemble any paint we sell under that name. This is a mixture of some blue paint with a part dirt, different from anything we are accustomed to deal in. I think there is inferior blue verditer among it mixed in with dirt. I should not consider this any paint: verditer is not called a high priced paint. Fifty cents is about a fair price. That used to be the price about six years ago. My impression is that was a fair price. It is not apt to injure by keeping. I never saw or heard that it was."

The defendants then offered in evidence a book of original entries made by their clerk at the time, for the purpose of showing that the sale was made in the first instance of three kegs of paint at certain prices, and that afterwards four kegs were included in the sale, and the price of one of them greatly reduced. An objection was made by the counsel for the plaintiff, to the admission of the book in evidence for the purpose for which it was offered, but the judge overruled the objection, and an exception was taken to his opinion.

The defendants then called and examined as a witness May Humphreys, whose testimony was as follows: "I have no interest in this question. This blue paint was originally Junius Smith's of London, and was sent out to Adams and Swift of Baltimore. After the failure of Adams and Swift, it came into my hands as agent. I was ignorant of the value of paints. I brought samples to Philadelphia, and with Mr. Bevan, exhibited them to Mr. Borrekens. Mr. Borrekens declined coming to any arrangement at that time; but enough passed between us to induce me to send them to this market. On my return to Baltimore, I sent the paints to Bevan and Porter to be subject to a re-examination. There were one or two more that samples had been *exhibited of. The cask of green was sold at a [26] reduction of fifty per cent. from what I had originally stated. Bevan and Porter settled with me and paid me the

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proceeds after they became due. They paid me many months before I heard of any objection being made to them. I was not present at the final sale. The first was indefinite, but was to become absolute, if on delivery, the articles corresponded with the samples. I accounted with my principal before I had knowledge of any objection. I accounted to Adams and Swift, in the settlement of an account with them. I think it was a twelvemonth after the sale, before I heard of any objection."

When the evidence was closed, his Honour charged the jury, "that the law was, that the plaintiff could not recover, unless an express warranty or fraud were proved: that a description in the bill of parcels of an article sold as blue paint, does not amount to a warranty that it is so; and that in order to support his action, it is incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants."

To this charge the counsel for the plaintiff tendered a bill of exceptions, which was sealed by the judge.

In this court the following errors were assigned, viz. :—

1. That the court below erred in permitting the defendants to give in evidence a book of original entries made by their clerk, for the purpose of showing the time and the circumstances of a certain sale made by them to the plaintiff, and the quantity sold, and the price agreed upon therefor; and for the purpose of showing also, that the quantity sold was afterwards increased, and the price thereof reduced.

2. That the court erred in charging the jury, that the plaintiff could not recover unless express warranty or fraud were proved.

3. That the court erred in charging the jury, that the description in the bill of parcels of the article sold, as blue paint, does not amount to a warranty that it is so.

4. That the court erred in charging the jury, that in order to support his action, it was incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants.

J. M. Read and *Kane* for the plaintiff in error.—1. The book of the defendants was not competent evidence, and ought not to have been admitted. The plaintiff had proved the contract of sale by exhibiting the bill of parcels rendered by the defendants, and assented to by the plaintiff, who had given his notes in accordance with it, and paid them at maturity. The defendants then offered their book of original entries to prove the nature and circumstances of the transaction, the time when the negotiation originated, and the modifications it underwent,

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before the contract was finally adjusted. Books are not evidence for purposes of this kind. They are evidence to prove the sale and delivery of goods, and the performance of work, but not to prove the negotiation, which led to the sale, or any other matter *merely incidental or collateral. The necessity which gave rise to the admission of evidence of this description, [*27] in the limited transactions of early times, when few clerks were kept, cannot be considered as applicable to the transactions of a great commercial house, whose numerous clerks and assistants enable them to produce witnesses to any matter connected with its business, which it may be necessary to prove. The policy of our courts has latterly been, to circumscribe, rather than enlarge the limits of the rule. There is no reason why the books of one party to a contract should be evidence more than those of another. There is certainly no reason why, when the tradesman's habits of business are dropped, and the necessity for such evidence has ceased, the merchant should have the privilege, given by necessity to the small shop-keeper. Large sales are now more frequently made at the counting-room of the purchaser, than at the warehouse of the seller, and the true cotemporaneous record of the transaction, would be the books of the purchaser; yet they are never admitted. A sale differs from a barter only in the consideration, it being merchandise in the one case, and in the other money; yet courts do not permit cash paid to be proved by the books of the party. The reason is, that the custom was not extended so far in early times, and policy forbids an enlargement of its ancient boundaries. The uniform effort of our courts for a long time past has been to multiply exceptions to a rule which is itself an exception to the general principles of evidence. *Baisch v. Hoff*, 1 Yeates, 198; *Poultney v. Ross*, 1 Dallas, 238; *Sterrett v. Bull*, 1 Binn. 234; *Cooper v. Morrel*, 4 Yeates, 341; *Rogers v. Old*, 5 Serg. & Rawle, 409; *Smith v. Lane*, 12 Serg. & Rawle, 80. The principle on which these cases have gone is, that wherever by the custom or trade, or the circumstances of the particular case, it appears that better evidence can be procured, books are not admitted. Thus, where there is a collateral undertaking, it is usual to make it in writing; where money is paid, a receipt is given; where goods are received for sale on commission, they are, by the usage of merchants, accompanied by instructions; where invoices have been copied, they can be produced; where receipts are by custom signed on the delivery of goods, the original receipts can be produced; and, as in this case, where a bill of parcels is rendered, that can be exhibited; in all these and similar cases, books are inadmissible. The admission of the books of the defendants in the present case, was calculated to lead to error and confusion.

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They exhibited two transactions, one on the 6th of April, the other on the 11th of May. One or the other was not in question, and consequently the entry relating to it, could not properly be evidence. The first was in fact not a sale, but a mere inchoate bargain as is proved by *Humphreys*, and was recorded, like the transaction in *Rogers v. Old*, as part of the pending business of the defendants, but not intended to charge the plaintiff. It was of course not evidence.

Another fatal objection to the admissibility of the books is, that the contract had been defined and fixed by the bill of parcels. It was *the defendants' own written exposition of [*28] the contract, and cannot now be varied, controverted, or explained away by the uncommunicated memoranda to be found in their private books. *Vandevoort v. Smith*, 2 Caines, 161; *Mumford v. M'Pherson*, 1 John Rep. 418; *Dean v. Mason*, 4 Day, 428; *Osgood v. Lewis*, 2 Harris & Gill, 522; *Yates v. Pym*, 6 Taunt. 446. If then the evidence of witnesses cannot be received to vary a contract thus reduced to writing, still less can a secret record made by the party himself, for his own purposes, be adduced, to prove negotiations, which are merged in the bill of parcels, or that the contract was different from his own exposition of it, communicated to and accepted by the opposite party. There is a distinction between a bill of parcels and an invoice. The invoice, as was said in *Jones v. Bright*, 5 Bing. 523, is frequently not sent till long after the contract is completed, and in such cases, "whatever was not matter of previous discussion, but formed part of the contract, may be given in evidence." The bill of parcels on the other hand, is the contemporaneous evidence of the contract. In the case before the court, it is dated on the very day of the contract, and ten days before the entry in the book, offered in evidence.

2 and 3. No fraud is imputed to any of the parties, who participated in the sale of the article in question, but it is insisted, the plaintiff is entitled to recover, because he had what amounted to a warranty, first, in the sample, and secondly, in the bill of parcels, the general principle being, that a sample, or a description in a sale note, advertisement, bill of parcels or invoice, is equivalent to an express warranty, not of the quality of the goods, but that they are of the kind they are represented to be. This is a question, which, however well settled by the usage and understanding of merchants, has never been judicially decided. *Jackson v. Wetherill*, 7 Serg. & Rawle, 480, which was relied upon by the Judge of the District Court does not touch it. That was a question of warranty as to quality; as to the habits of a horse, and the decision of the court was nothing more, than that certain expressions used by the seller, were

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merely declarations of his opinion, and not a warranty of the qualities of the animal sold. *Curcier v. Pennock*, 14 Serg. & Rawle, 51, was not the case of a described article, bargained for by a fixed name, but of an article exhibited to the buyer. It was called "Cayenne money," on the plaintiff's books, but its genuineness had been throughout matter of question, and had been the subject of separate inquiry by the receiver, who took it on speculation, at his own risk. It was decided on the particular circumstances of the case, and no question was raised as to the article delivered, being the same in kind as that contracted for. The Pennsylvania cases then, it is clear, do not sustain the opinion of the court below. In admitting that the question is *res integra* here, all is admitted that can be asked on the opposite side. It can be solved only by reference to the laws of other countries, whose interests are analogous to our own, and by an inquiry into the policy of those laws. In France, and wherever the civil law *prevails, that is, throughout the commercial portion of the continent of Europe, the law is what the plaintiff now contends for. Pothier de Vente, sec. 202, p. 121. [*29] The seller is bound by the very nature of the contract of sale, to guaranty, that the thing sold is free from such defects as would render it useless or injurious for the purpose for which it is sold; and without any other warranty than that which is implied in the very nature of the contract, the buyer has his action for redress. Civil Code Nap. Art. 1640, 1641. The law of implied warranty, it is true, does not apply to patent defects, against which, by the common law, even an express warranty, affords no protection. 3 Bl. Com. 165. In England at a very early day, the rule which governed real property, was applied to the transactions of commerce. At first little injury resulted from this circumstance, because trade was very limited in amount, and generally conducted in market overt, and there were few articles which could not be judged of by inspection at the Chapman's Stall. In the year 1600, or thereabouts, the case of *Chandelor v. Lopus*, Cro. Jac. 4, was decided on this principle. But as commerce increased, the rule was found intolerable; for commerce cannot exist without confidence, which can be secured only by compelling every contracting party to do that which at the time of contracting, he professed his intention to do. A multitude of more recent decisions in England, have placed the doctrine on a footing more in accordance with the necessities of the extended commerce of that country, and the laws of other commercial states. *Hibbert v. Shee*, 1 Camp. 113; *Laing v. Fidgeon*, 2 Taunt. 108; 1 Eng. Com. Law Rep. 327; *Parker v. Palmer*, 4 Barn. & Ald. 387, 6 Eng. Com. Law Rep. 456; *Bridge v. Wain*, 1 Stark. 504, 2 Eng. Com. Law Rep. 486;

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Rowe v. Osborne, 1 Stark. 140, 2 Eng. Com. Law Rep. 329; Yates v. Pym, 6 Taunt. 446, 1 Eng. Com. Law Rep. 446; Gardner v. Gray, 4 Camp. 144; Bosser v. Hooper, 1 Moore, 106; Jones v. Boaden, 4 Taunt. 853; Dye v. Fynmore, 3 Camp. 162; Peake's Ev. 228; 3 T. R. 57; Shepherd v. Kain, 5 Barn. & Ald. 240, 7 Eng. Com. Law Rep. 82; Hern v. Nichols, 1 Salk. 289; Paley on Agency, 229; Fortune v. Lingham, 2 Camp. 416; Gray v. Coxe, 10 Eng. Com. Law Rep. 283; Jones v. Bright, 5 Bing. 533, 15 Eng. Com. Law Rep. 529; Salman v. Ward, 12 Eng. Com. Law Rep. 95. The more recent decisions in New York, Massachusetts, and Maryland, and the other commercial states of the Union, are in harmony with the principles of the modern English cases. Bradford v. Manly, 13 Mass. Rep. 145; Sands v. Taylor, 5 Johns. Rep. 395, 404; Willing v. Consequa, 1 Peters, 317; Swett v. Colgate, 20 Johns. Rep. 196; Oneida Company v. Lawrence, 4 Cowd. 440; Andress v. Neelin, 6 Cowd. 354, 357; Hastings v. Levering, 2 Pick. 214; Conner v. Henderson, 15 Mass. Rep. 319; Henderson v. Sevey, 2 Greenl. 139; Chapman v. March, 19 Johns. Rep. 290; Roberts v. Morgan, 2 Cowd. 438; Higgins v. Livermore, 14 Mass. Rep. 106; Hastings v. Lovering, 2 Pick. 214; Lewis v. Thacher, 15 Mass. Rep. 431; Osgood v. Lewis, 2 Harris & Gill. 495, 518; [*30] Williams v. Spafford, 8 Pick. 250. The question, *therefore, for the determination of this court is, whether the law of Pennsylvania on the subject of implied warranty, shall correspond with that of France, England, and the commercial states of this country, as it exists at the present day, or whether it shall be a transcript of the law as introduced into England some centuries ago, which has been repealed, and repudiated in favour of the commercial necessities of that country.

As to the policy of the rule now contended for by the plaintiff, it is impossible to entertain a doubt, for no one can deny that a man should so execute his contract as to comply with the just expectations of the other contracting party, and with his own declared intentions. If a man purchase tea from a China merchant, and having sold it to a western trader, it turns out that the box contains chaff, he is bound by the unvarying usage of trade, in such cases to refund the price. Even the law of China gives redress. If one purchase plate of a silversmith, and on using it, it is discovered that the metal is base, the seller must return the money, and even ignorance of the fraud will not excuse him. So if one purchase a box of bullion, a bale of cotton, or a cask of paints, and it turns out, that the box contained pewter instead of bullion, the bale, stones or rubbish, instead of cotton, or the cask, dirt instead of paint, it cannot be law, that the party aggrieved is without redress; yet such is the

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result to which the doctrine of the court below must necessarily lead. If there is no redress without express warranty or fraud, there is no redress at all. As to fraud, the essential element of it is the *scienter*, and how can that be proved? How can the purchaser show that the seller was a better judge of the article than himself? If he sold bullion, he was perhaps, no more of an alchemist than the buyer. If cotton, he probably never unpacked the bale, and knew nothing of its contents further than had been represented to him. The rule by which justice would be done to all, is that which gives a remedy to the buyer against the party from whom he immediately purchased, and refers him to the party from whom he had the article, and so on until the party guilty of the fraud is reached. Then, as to warranty; men ask warranty of quality, but never of kind or character. In buying a horse, the purchaser asks warranty of soundness, because though blind or lame, the animal is still a horse. So in buying a ship, a warranty of seaworthiness is asked for, because though rotten in every timber, the vessel is nevertheless a ship; but who asks for a warranty that a horse is really a horse, or a ship a ship? Fraud, in cases like the present, can easily be proved, if it exist, and often has no existence between the immediate parties; and such a thing as an express warranty, that the article described in the contract of sale, or the bill of parcels defining the contract, and the article really sold, are the same, was probably never heard of. To affirm the judgment of the court below is, therefore, equivalent to a decision, that in no case, can a party aggrieved in a contract of sale like that now under consideration, obtain redress in a court of justice.

*4. The error in the charge of the court below, that it was incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants, arose from confounding two remedies, which were within the plaintiff's reach, and between which he made his election. Where the consideration of a contract has been executed, and there is a failure to complete the performance, the party aggrieved may either rescind the contract, and recover back the consideration, or admit the contract, and recover damages for a breach of it. The consideration may be recovered back, by a special action on the case, or by an action for money had and received. To sustain either of these actions, with such an object, the plaintiff must show, that he has paid the consideration, and that by recovering it back, the defendant will not be placed in a worse situation than he was before the contract, which the plaintiff cannot rescind to the prejudice of the defendant. He must, therefore, show, that before bringing suit, he redelivered or repaid what he received from the defendant, and has thus restored

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him to his former situation. But it is not always in the power of the party aggrieved, to rescind the contract, and recover back the consideration. The goods may have been shipped, or worked up, before the injury is ascertained, and the return of the goods then becomes impossible. In such a case, the remedy is by a special action on the contract, alleging a breach, and demanding damages for it. In adopting this form of action, the plaintiff avoids the necessity of showing a redelivery. These remedies accord with those of the civil law, from which most of our commercial principles are derived. Where the article sold differs in character from that described, the purchaser, by that law, has two remedies, 1st, *Actio redhibitoria*, in which he returns the article, and recovers back the price, and all expenses incurred by him; 2d, *Actio quanto minoris*, by which without a return of the article sold, the buyer obtains such a reduction of price, or a return of so much of it as is equal to the difference in value between the article described in the contract, and that delivered. Pothier Cont. de Vente. sec. 216; Art. 4, p. 129, sec. 232; Art. 5, p. 135. The doctrine now contended for on behalf of the plaintiff, is abundantly supported by authority. Many of the cases referred to in the examination of the second and third errors, sustain it, to which may be added *Curtis v. Hannay*, 3 Esp. 82, 83; *Peake's Ev.* 230; *Fielder v. Starkin*, 1 H. Bl. 19; *Poulson v. Lattimore*, 17 Eng. Com. Law Rep. 373. This doctrine applies, not only to cases of express, but of implied warranty also. If it were otherwise, it would be most ruinous doctrine. Fortunately the cases take no distinction between cases of express and implied warranty. In *Steigleman v. Jeffries*, 1 Serg. & Rawle, 478, Chief Justice Tilghman shows the result of the English cases in a few words, and explains how it is, that some of them at the first glance, wear an appearance at variance with the principle, which upon closer examination, they do not affect. The opposite doctrine would lead to the worst results, and in many cases operate as a bounty to fraud. If when [*32] *a man has paid his money for a horse, which he contracted for by a certain description, and one of another and inferior description, is delivered to him, he must, before he can maintain an action for the fraud, return the animal he has received, he puts it in the power of the jockey to injure him still further, by keeping both the money and the horse, and thus depriving him even of the partial consideration for which he paid his money. It is making the operation of a legal right a species of gaming, to require, that before a man shall have a chance of recovering back, what he has been cheated of, he shall stake what he has received against the blacklegs.

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Chauncey, for the defendants in error.—This is one of the many cases in which by confining the attention to the exact matter of exception, injustice is done to the judge and to the cause. To understand the charge, it is necessary, first to understand the case, and see what the facts were on which the charge was founded. This result will not be reached, by taking an abstract position in the charge, and making that, by itself, the subject of exception. The evidence is brought up for the purpose of elucidating the charge, and should be used for that purpose. A proposition may be stated by a judge, which in the abstract may be questionable, but which, taken in connection with other matter, may be correct. If taken in connection with the evidence, the charge of the judge in this case, will be found free from error. The sale was made in May, 1820, and no complaint was made for nearly a year, and no suit was brought for nearly two years after. On the trial the plaintiff endeavoured in the first place to prove a sale by sample, in which the evidence did not sustain him. The judge charged, that a sale by sample implies a warranty, and left to the jury the fact, whether or not the sale was by sample; stating his own impressions that it was not. It is not now matter of exception that the judge did not leave this to the jury, nor could it be, for he did. It must therefore be considered that the jury found that it was not a sale by sample. *Brown on Sales*, 338; *Meyer v. Everth*, 4 Campb. 22. The plaintiff, in the second place, endeavoured to establish that the description in the bill of parcels, was a warranty that the article sold corresponded in character and quality, with the description. The judge referred to the consideration of the jury, whether the plaintiff examined the article, and stated it to be clear that he did so, or had the opportunity of doing so. Under these circumstances he charged that this bill of parcels, evidently made after the purchase, was no more than a description, not a warranty, as in *Jackson v. Wetherill*, 7 Serg. & Rawle, 480. The case then stood thus. It was for the jury to decide whether it was a sale by sample. If it was, it was a case of warranty, and then the jury were to consider whether the bulk corresponded with the sample. If it was not a sale by sample, was it a case of warranty, by means of the bill of parcels? Under the circumstances the judge thought it was not, and the plaintiff did not declare upon it as such. The bill of parcels was not the contract, but a mere description. The purchaser [*33] *bought either upon examination, or with opportunity to examine, and the bill of parcels was made and rendered after the sale. It is upon this state of things the judge must be considered as having charged, that if there was neither warranty

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nor fraud, the plaintiff was not entitled to recover. In this he was right,

First. Because this was not a sale by sample, and must be taken to have been so found by the jury. If it was such a sale, the charge was in favour of the plaintiff.

Second. It was a sale of a commodity in the usual course of business, where the purchaser had abundant opportunity to examine, and where it must be presumed he did examine the article, and the purchase was made on that examination, and not on any warranty express or implied.

Third. It was a sale on credit, made by agents, and the payments were made by the purchaser at four, six and eight months, without objection, and the agent has accounted with and paid over to his principal.

Fourth. It was not a sale upon warranty, and the purchaser, if he objected to the article, and was entitled to object, was bound to return or offer to return the article.

First. It is unnecessary to spend a moment in the examination of the cases cited to show that a sale by sample carries with it an implied warranty. The principle contended for was not denied by the judge, nor is it now.

Second. Under the circumstances of this case, in the absence of fraud and warranty, neither of which is alleged, the purchaser stands nakedly on his own judgment of the article, and if he misses in that, he has no redress. The case is a fair one, to present the rule of law which is well settled, and is clear of the various exceptions which have been made to the rule. No rule can be more salutary or reasonable than that which the judge applied to this case. The seller and buyer were equally ignorant of the quality of the article, of its distinctive features and character. It was an article brought from a far country, paid for by the seller under the same description, and sold with a full belief it was the article he undertook to sell. The buyer made the purchase under the same impression. It turns out to be of inferior quality, adulterated, and that a fraud has been practiced abroad. Reason and common convenience would say, that the seller and purchaser being on equal terms, the maxim *caveat emptor* must govern the case. It seems to be agreed, that if there be neither warranty nor fraud, the seller is not responsible for mere inferiority of quality, but it is contended he is bound to give a merchantable article of the kind and character he undertook to sell. There is no reason, however, for a distinction between the cases, where the purchaser has an opportunity to examine the article. If the article turns out to be of inferior quality, it is conceded, that the seller is not answerable, because the buyer purchased on his own judgment, and asked no war-

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ranty. The same reasoning applies with equal *force to the case of admixture, of adulteration of different sub- [*34] stances whole or in part. Admixture, particularly such as occurred in this case, of blue paint and dirt, is as easily detected, perhaps more so, than mere inferiority of quality. If the purchaser avails himself of the opportunity of examination, or buys as if he had examined, where is the reason for a difference between this case and that of mere inferiority of quality? If the rule be adopted at all, it must be throughout. But the rule of the Roman law, that sound price calls for sound goods, is not the rule by which we are governed. The common law is our law. The rule of reason and that which is sanctioned by the best authority is, that when a sale is made of an article in the usual course of business, and a full opportunity is given to the purchaser for examination, and there is neither warranty nor fraud by the seller, the buyer cannot resort to the seller, on the ground of inferiority of quality, of adulteration, of admixture, or of any difference in the article. There are some cases, decided in later times, which either do not come within the rule, or may be considered as exceptions to it. One of these is, the purchase of a manufactured article from the manufacturer, who is considered as warranting that the article he sells or makes for the purchaser, is of a fair merchantable quality. Such were the cases of *Laing v. Fidgeon*, and *Jones v. Bright*. Another of these cases is that of a sale of articles not usually the subject of examination, or which cannot be examined. Thus if a wine merchant undertakes to sell Madeira, and sends Teneriffe, or if an apothecary professes to sell magnesia and delivers cream of tartar, the purchaser is not bound. There may be cases too, ruled by the custom of trade, with regard to which the court should be very cautious. Perhaps another case may be that of a sale of an article for a foreign market, or for a specific purpose, as in the case of *Gray v. Cox*. The present case may be considered one of mere inferiority of quality, which arises from various causes, of which it is sometimes very difficult to judge. Mr. Troth, the most skilful man examined, says the article might be blue paint, but did not resemble any paint he sold under that name; it was a mixture of inferior blue paint and dirt. An examination of the books will show, that the rule now proposed on behalf of the defendants in error, has the support not only of good sense, but of authority, although a case may now and then occur, or a sentiment be expressed by a judge, wearing a different aspect. (Mr. Chauncey here examined and explained a number of the cases cited by the counsel for the plaintiff in error, for the purpose of showing that they sustained the principles for which he contended. He also referred

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to *Parkinson v. Lee*, 2 East, 314; 2 Kent's Com. 274, 275; *Wilson v. Shackelford*, 4 Rand. R. 5.) The rule which may be fairly deduced from the cases, is that for which the defendants in error now contend, and which was applied by the court below to the present case. The plaintiff did not declare upon a warranty, nor was there any evidence that a warranty was expected, or intended to be given, but the contrary. The sale [*35] was made on inspection actually had, or opportunity offered for it. The bill of parcels was given afterwards. In such a case it can be regarded as no more than a mere description of the thing sold, not even amounting to an affirmation that it really was what it was described to be, and still less to a warranty to that effect. Cases of a description before the sale, by advertisement, or in the contract by a sale note, bill of parcels, or invoice, may involve a warranty, but it is impossible to infer a warranty from a description given after the sale is completed. In laying down the law to the jury, the judge founded himself upon *Jackson v. Wetherell*, 7 Serg. & Rawle, 480; *Curcier v. Pennock*, 14 Serg. & Rawle, 51; *Calhoun v. Vecchio*, 3 Wash. C. C. R. 165; *Barrett v. Hall*, 1 Aik. Rep. 269; *Brown on Sales*, 409.

The position of the judge who tried the cause, that it was necessary, to enable the plaintiff to support the action, to show that he had previously returned or tendered the article, was sound, upon the ground that there was no express warranty, in which case alone, the plaintiff is at liberty to sue upon the warranty, or defend himself by means of it, without returning or offering to return the article. The reason of this distinction between express and implied warranties, is that the former affirms and the latter annuls the contract, and no case can be found in which the party can keep the article, where his claim or his defence annuls the contract. This position is fully sustained by authority. *Brown on Sales*, 341, 475; *Fisher v. Lancaster*, 1 Camp. 190; *Groning v. Mendham*, 1 Starkie, 257; *Rowe v. Osborne*, 1 Starkie, 140; *Ritchie v. Summers*, 3 Yeates, 531; *Thornton v. Wynn*, 12 Wheat. 183; *Burton v. Stewart*, 3 Wend. 238; *Saund. on Pl. & Ev.* 303, 304; *Kimball v. Cunningham*, 4 Mass. R. 502; *Connor v. Henderson*, 15 Mass. R. 319; *Curcier v. Pennock*, 14 Serg. & Rawle, 51; *Steigleman v. Jeffries*, 1 Serg. & Rawle, 477; *Grimaldi v. White*, 4 Esp. N. P. R. 95.

Another conclusive objection to the plaintiff's recovery, was that the defendants were agents, who had accounted with their principal, and paid over the proceeds of the sale, before any objection was made. *Paley on Agency*, 37, 45.

In reply, the counsel for the plaintiff in error disclaimed any

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desire to avoid a discussion of the question under consideration, without full reference to everything which could explain or vindicate the judgment of the court below. It would be attended with little advantage to do so, as, in case that judgment should be reversed, it would be easy for the counsel of the defendants in error to place upon the record when it came up again, all the facts and circumstances, calculated to present the question to this court, in such a manner as he deemed essential to a proper determination of the question. The declaration was drawn before it was known what evidence would be given, and certainly without any view to a contest about technicalities; and from what passed between the counsel on both sides, it was understood, that the cause was to be tried without regard to *form; [*36] that if the plaintiff could recover on any declaration, he should on that which was filed, and that if the defendants could escape on any plea, those which were put in should protect them. In the same spirit, the cause was tried.

Whether a sale is "in the usual course of business," and whether "the purchaser had a full opportunity of examining the articles," are questions of fact which should have been left to the decision of the jury, for unless decided by them affirmatively, the plaintiff's right to recover would not be affected by the rule contended for on behalf of the defendants. But the court did not charge in the qualified language used by the counsel. The judge said nothing about "the usual course of business," or "opportunity to examine," but that "the plaintiff could not recover without express warranty or fraud, and that a description in a bill of parcels was not equivalent to a warranty." In this there was error even on the principles laid down on the opposite side. But these principles are themselves opposed by a host of English authorities, and to avoid their operation, the counsel introduces numerous and important exceptions, within which, however, it is impossible to bring many of the cases, with which he has to combat. If, however, the general principle be admitted to be correct, the exceptions are sufficient for the purposes of the plaintiff in error. How does it appear that paints are usually the subject of examination by the buyer? It is certainly as usual and as natural for a purchaser of wine to taste and judge for himself, as for a manufacturer of paper hangings to examine every cask of paint he buys, yet it is admitted that he to whom wine is delivered of a different character from that which he contracted for, is entitled to redress. How too does it appear that the article was not sold for a specific purpose, another of the exceptions stated by the opposite counsel? The plaintiff is among the most extensive manufacturers of paper hangings in the United States, and if the court had qualified their doctrine as

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the counsel now does, the intent of the purchaser might have been understood by the jury, and their verdict different. Here again the charge works an injury to the plaintiff in error. Every purchaser has some purpose in view, and ought it to be assumed, because the specific purpose is not declared, that therefore the purchaser intended to buy what had no value for any purpose? "No man," says Lord Ellenborough, in *Gardiner v. Gray*, 4 Campb. 144, "can be supposed to buy goods to lay them on a dunghill." The difficulty of distinguishing between great inferiority of quality, and entire difference in the article, is no reason for breaking down the distinction to be found in the books. To say that *trespass vi et armis* is the remedy for deceit, and case for consequential injuries, is to make in many cases, a most puzzling distinction. Even to say that a sane man may make a will and that an insane one may not, is to establish a principle, which in its application sometimes splits a hair. Yet these distinctions, so difficult in application, are perfectly well settled in law. But the cases already referred to expressly decide, [*37] *that whether the purchaser had an opportunity to examine, and whether he did examine or not, make no difference as to the responsibility of the seller. If then the general principle offered by the counsel for the defendants in error be not established in its extreme bearings, and if its exceptions be not narrowed down within the limits which he has himself prescribed for them, the authorities already cited may be reverted to to show, that in England at this time, as in France, and Europe generally, the contract of sale implies a warranty, that the article sold shall correspond in character with the article described; and that it shall correspond in quality with the sample, if a sample has been exhibited.

The opinion of the court was delivered by

ROGERS, J.—After the testimony, which is particularly set forth in the bill of exceptions, was closed, the court charged the jury, that the plaintiff could not recover, unless an express warranty, or fraud was proved: That a description in a bill of parcels of the article sold, as blue paint, does not amount to a warranty, that it is so; and that in order to support his action, it is incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants. If the court were correct in any one of these propositions, there was an end of the plaintiff's case. The counsel for the plaintiff in error, and plaintiff below, have filed exceptions, which embrace the whole charge.

It is conceded, that with regard to the goodness of wares purchased, the vendor is not bound to answer, unless he expressly

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warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented to the buyer. 2 Bl. Com. 451. The rule is as respects the quality of the article, *caveat emptor*.

According to the modern cases, warranties are divided into two kinds; express warranties, where there is a direct stipulation, or something equivalent to it, and implied warranties, which are conclusions and inferences of law, from facts, which are admitted, or proved before the jury. If the learned judge intended to say, that there can be no warranty, without an express agreement, or stipulation, or there be fraud, then his opinion is in opposition to the whole current of modern decisions. It must now be taken to be the law, (for they have conceded this in England, and even in New York, where the cases of *Chandelor v. Lopus*, and *Seixas v. Wood*, were decided,) that where property is sold by sample, there is an implied warranty, that the article corresponds with the sample, although it has at the same time been held, that it is sufficient if the bulk corresponds with the sample. This has been considered as equivalent to an express warranty and is doubtless a departure, so far, from the law as formerly understood. From a critical examination of all the cases, it may be safely ruled, that a sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described, or represented to be, by the vendor. *In [*38] the absence of proof, to rebut the presumption, it is of equal efficacy, to charge the vendor, as if the seller had expressly said, I warrant them to correspond with the description or representation. 13 Mass. Rep. 139; *Bradford v. Manly*, 5 John. Rep. 395; 1 Camp. 113; *Hibbert v. Shee*, 1 Peters, 317; *Wilings v. Consequa*, 1 Eng. Com. Law. Rep. 327; 20 John. Rep. 196, 204; 4 Cowen, 440; 19 John. Rep. 290; 6 Cow. 354; 4 Barn. & Alder. 387, 6 Eng. Com. Law Rep. 456.

Without intimating an opinion how the fact may be, yet there was proof, from which the jury would have been justified in saying, that this was a sale by sample. The paints were originally the property of Junius Smith of London, and were sent out to Adams and Sift of Baltimore. After the failure of Adams and Sift, they came into the hands of Mr. Humphreys, a witness examined by the defendants. Mr. Humphreys brought samples of the paints to Philadelphia, and with Mr. Bevan, one of the defendants, exhibited the samples to the plaintiff. Mr. Borrekens declined coming to any arrangement at that time, but enough passed to induce the witness to send them to the Philadelphia market; and accordingly on his return to Baltimore, he

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sent the paints to Bevan and Porter, to be subject to a re-examination. The witness further states, the first arrangement was indefinite, but was to become absolute, if on delivery, the articles corresponded with the samples.

After the purchase, the paints were carried to the plaintiff's manufactory, and some time after they were delivered, Mr. Borrekens brought a sample of the stuff, as the witness Isaac Blanchard termed it, and directed him, Blanchard, to go down to Messrs. Bevan and Porter, and say, that he claimed the money paid, because the article was not according to sample. The witness then exhibited the sample, which Mr. Borrekens had given him, and told Mr. Bevan, that was a sample of the blue, which Borrekens had purchased of him. Mr. Bevan took a little in his hand, and said, "This is not blue. It does not look as if it ever had been blue." He then stated, there would be no difficulty about settling it; that Mr. Humphreys was not then in the city, but was expected shortly; and that there was no doubt, the matter would be adjusted amicably. On this evidence it is very far from being clear, that this was not a sale by sample. It strikes me, that the evidence tends to prove that it was so sold, and moreover, that Bevan intended to sell, and Borrekens to purchase blue paint. If the parties had not so understood it, Bevan would have denied, that it was a sale by sample, and would, at the same time, have asserted, that Borrekens took upon himself to judge of the quality and kind of the article sold. At any rate, taken in connection with the admission of Mr. Humphreys, the jury should have been permitted to judge, whether it was a sale by sample. There was also some evidence, whether sufficient for the purpose, I shall not say, that the article did not correspond with the sample. This was evidently sold as blue paint. It was the intention of the vendor [*39] to sell blue paint, as such a sample *was exhibited by Humphreys to Mr. Borrekens. The article received, was, by the admission of Bevan, not blue, nor did it look as if it ever had been blue. Henry Troth, who has been accustomed to deal in paints, and verditer among the rest, says, this might be called blue paint, but it does not resemble any paint we sell under that name. This is a mixture of some blue paint with a part dirt, different from anything we are accustomed to deal in. He thinks, there is inferior blue verditer among it mixed in with dirt. He says, there is a variety of qualities in the market. This would not be considered in the market, as blue verditer. He should not consider this as any paint.

It is not pretended, that this was not the same article, which Borrekens purchased of the defendants, nor do I understand fraud to be alleged, either on the one side or the other.

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It was the duty of the court to submit the facts to the jury, with the instruction, that if they believed, that this was a sale by sample, and were further of the opinion, that the bulk did not correspond with the sample, the plaintiff was entitled to recover: It is possible, from the manner, in which this case has been removed, we may do injustice to the charge of the learned judge, yet from the record, we are compelled to say, a material question has been withdrawn from the jury, in which we concede, there is error. The court after charging the jury, "that the plaintiff could not recover, unless an express warranty or fraud was proved, proceed to instruct them, that a description in a bill of parcels, of the article sold as blue paint, does not amount to a warranty, that it is so."

I must premise, that we do not consider the bill of parcels as the contract between the parties, but as the evidence of the contract, nor is it in Pennsylvania, the only evidence. The bargain is not usually in writing, but verbal, and the bill of parcels is intended to show, that the goods were purchased, and what goods, and that they were paid for. And in this opinion, we are supported by the cases of *Bradford v. Manly*, 13 Mass. Rep. 142, and *Osgood v. Lewis*, 2 Maryland Rep. 522.

It results from this, that inasmuch as this was a verbal and not a written agreement, it is the province of the jury to ascertain what the contract was, and to declare what was the intention of the parties to it, as was decided in *Osgood v. Lewis*, 2 Maryland Rep. 526; 8 Cowen, 25, *Duffee v. Mason*. In parol contracts the jury must determine whether a warranty was intended. In the case of written contracts, the court must decide whether the instrument contain an express warranty as such.

To fix the precise meaning of the judge in this part of his charge, has been attended with some difficulty. I understand him, in effect to say, that even, if the defendants sold, and the plaintiff purchased, the article, for blue paint, it does not amount to a warranty, if on delivery, it turns to be an entirely different commodity.

It is this position which I now propose to examine, and in doing so, I do not think it necessary to review all the cases, which have been *decided at Nisi Prius on the doctrine [*40] of implied warranty. In regard to the English Nisi Prius Reports, Justice Bayley is reported to have said, "that it is very likely one's first thoughts at Nisi Prius may be wrong, and he was extremely sorry, that they were ever reported, and still more so, that they are mentioned again, at least so far, as his own Nisi Prius decisions are concerned, because he thinks, they are entitled to very little weight. What is said by a judge upon a trial, is merely the first impression of his mind, upon a

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point coming suddenly before him, and which he had no opportunity of considering beforehand."

My own experience, and the examination which I have given this question has not increased my veneration, for cases ruled at *Nisi Prius*. Those on warranty are numerous, and I believe, I may venture to say, cannot all be reconciled.

There is, however, a class of cases in England, to the authority of which I subscribe, which bear immediately on the present question. I refer to those decisions where the goods purchased, are different in specie, from those contracted for.

The first case is *Weall v. King*, 12 East, 452, which was the case of the sale of stock sheep, and it was proved, they did not answer the description of stock sheep, that is, sound lambs, but were unsound, and afflicted with the rot: under such circumstances, says Lord Ellenborough, the purchaser has a right to expect a salable commodity, answering the description in the contract. Without any particular warranty, this is an implied term in every contract. He cannot, without a warranty insist, that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be, that it shall be salable in the market, under the denomination mentioned in the contract. *Gardener v. Gray*, was where silk was sold as waste silk, whereas in fact it was not so. And *Bridge v. Wain*, 1 Stark. N. P. C. 104, was the case of Scarlet Cuttings, which in reality were not Scarlet Cuttings. The case of *Shepherd v. Kain*, 5 Barn. & Ald. 240, is exceedingly strong, to the present point, where in an advertisement, of the sale of a ship, she was described as a "copper-fastened vessel," but with these words subjoined, "the vessel to be taken with all faults, without allowance for any defects whatsoever." The vessel when sold was only partially copper-fastened, and she was not what was called in the trade, a copper-fastened vessel. The buyer, however, had a full opportunity of examining the vessel before the sale. But it was determined, that the buyer was entitled to damages in an action upon the warranty, and that the words, "with all faults," could only mean all faults, which a copper-fastened vessel may have; but here, the vessel was not what she was warranted to be, namely, a copper-fastened vessel. In *Proser v. Hart*, 1 Stark. 140, it is fair to presume, that if there had been nothing existing in that case, which controlled the general rule, Chief Justice Gibbs would have ruled in accordance with these principles, that the defendant was liable, on his warranty. The Chief

[*41] Justice *says, the article was sold to the plaintiffs, by the name of "saffron." They examined it with great minuteness, received it into their custody; kept it six months, and then sold part of it. Although only three-fourths of it was saffron,

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still it was fair for the jury to infer, from the inferior price that was given for it, that it was such an article, as the plaintiffs intended to purchase, and under circumstances, they were justified in giving the verdict for the defendant.

We are not without authority to the same point, in some of our sister states. *Bradford v. Manly*, 13 Mass. Rep. 139, is a case of the same description. The Supreme Court of Massachusetts decided that a sale by sample is tantamount to a warranty, that the article sold is of the same kind as the sample. The principal object seems to be to ascertain what was the contract; whether the evidence proved a contract to sell cloves of a different kind, from those which were delivered. The objection was as here, that no action upon a warranty, can be maintained, unless the warranty is express; and that no other action can be maintained unless there is a false affirmation with respect to the quality of the article. If such were the law, says C. J. Parker, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold. Even in New York, although in 4 Johns. Rep. 421, they decided, that the mere selling an article as good at a fair price did not amount to a warranty, and that without express warranty or fraud, the purchaser could not recover for any defect in the article; yet in 5 Johns. Rep. 404, it was determined, that a sale by sample, although no warranty that the goods are sound, and in good condition, yet is a warranty, that they are of the same kind. And in *Parkinson v. Lee*, 2 East, 314. 4 Camp. 22, 145, the same distinction would seem to be recognised. In *Hastings v. Lovering*, the Supreme Court of Massachusetts assert the same doctrine. That was an action on a contract of warranty in the following terms:

Boston, April 11th, 1822.

Sold to E. F. Hastings, two thousand gallons, prime quality winter oil, &c., at 81 cents per gallon, six months' credit, deliverable within ten days, credit to commence on delivery. William Lovering, Jr. There was also a bill of parcels, in which the oil was called, "Prime quality winter Sperm. Oil." It was contended, as here, that these writings did not prove an express warranty. The jury found, that the oil delivered, did not answer the description; the court however, ruled, that the vendor was answerable on the warranty, and explicitly assert the principle, that a description of an article, inserted in a bill of parcels, or in a sale note, such as is used in England, ought to be considered evidence, that the thing sold, was agreed to be such as represented.

Osgood v. Lewis, in many respects, bears a strong analogy to

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Hastings v. Lovering. This was also an action on the warranty. The plaintiff, as appeared by the bill of parcels, purchased of the defendant, 115 casks of winter pressed sperm. oil. The oil [*42] was *delivered to the plaintiff, and kept by him some time. It subsequently turned out to be not winter, but summer pressed oil which is of an inferior quality, and of a different species. The court say, if the bill of parcels be considered as the written contract between the parties, the statement therein, that the oil was "winter pressed," could not be considered as a mere matter of description, or of an opinion, and belief of the seller; but as the averment of a material fact, of which he has taken to himself the knowledge, and the existence of which he warrants.

In all cases where it does not correspond in kind, the purchaser has a right to say, this is not the article I contracted for, *non in hæc federa veni*, and this, whether he complains at the time of delivery, or after, unless his conduct amounts to a waiver of his right to indemnity. And I venture to assert, no honest fair dealer, under such circumstances, would refuse redress. I do not look upon it as an imperfect obligation, but one in which the aggrieved has ample redress.

It is no unreasonable presumption, that every vendor is acquainted with the commodities, which he sells; I do not mean the quality, but the kind. This, however, is not always the case of a vendee. The purchaser, in numberless cases which could be mentioned, relies on the integrity and knowledge of the vendor. If a person purchase Madeira wine of a wine merchant, surely, he cannot be compelled to take Teneriff, Lisbon, Sherry or Malaga; although he may have tasted it at the store, or been under the impression at the time it was delivered, that it was the kind, with which he wished to entertain his guests. So also, in the case of an apothecary, who delivers jalap, when the purchaser intended to have cream of tartar. If a person purchased of a jeweller, what both parties suppose to be diamond ring, a case of mutual mistake, which, after delivery, is discovered to be glass, there would certainly be a remedy, and this could only be implied on the warranty. And this, I understand, to be conceded, because, says the counsel for the defendant in error, they are presumed to be acquainted with the article in which they deal. If this be so, then the case of *Chandelor v. Lopus* must be abandoned, for undoubtedly, as the law is now held, the jeweller would have been liable on the implied warranty. And the same may be said of *Seixas v. Wood*, 2 Caines' Rep. 48. *Swett v. Coligate*, 20 Johns. Rep. 196, which are in opposition to the law of England, Massachusetts, and Maryland, as has been shown by the cases to which I have referred. In *Seixas v. Wood* the court do not advert to the distinction, that it was a different

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article, but seem to have grounded their opinion, mainly on the case of *Chandelor v. Lopus*. It is to be observed, that *Seixas v. Wood* was ruled by a divided court, and it is to be remarked, that Chancellor Kent, who delivered the opinion of the court, has in his Commentaries, since expressed some dissatisfaction with the application of the rule, *caveat emptor* to the facts of that case. In the 2d volume of his Commentaries, he says, "There is no doubt of the existence of *the general rule, as laid down in *Seixas v. Wood*, and the doubt is, whether [*43] it was well applied in that case, where there was a description in writing of the article by the vendor, which proved not to be correct, and from which a warranty might have been inferred. The truth is, *Chandelor v. Lopus* has been denied to be law, and *Seixas v. Wood* has also been questioned, and its authority much shaken even, in some adjudged cases in the state of New York.

As a general rule, I do not mean to impugn the doctrine, that in sales of personal property, the vendor is not answerable for any defects in the quality of the article sold, without an express warranty or fraud. But it must be admitted, that the rule is qualified with many exceptions. Of this description, I take to be *Laing v. Fidgeon*, 6 Taunt. 108; *Gray v. Coxe*, 4 Barn. & Cresswell, 108; *Bluett v. Osborne*, 1 Stark. 377, in addition to those to which I have particularly adverted. The exigencies of society, the constant change, which is daily taking place in the course of trade, and commercial dealing have caused the courts to relax the rigidity of the ancient rule, and it is remarkable, that the same course has been pursued in regard to the civil law, where the rule is directly the reverse of ours.

It has been said, that the doctrine only applies to executory contracts, but it will be observed, that all cases are actions on the implied warranty, where the contract has been executed, either at the time or afterwards, by payment of the money, and delivery of the property. In *Hastings v. Lovering*, 2 Pick. 221, there was an attempt made to put it on the ground of an executory contract, but this is expressly negatived by the court, who ruled the case as one, where the contract was executed.

In all sales, therefore, there is an implied warranty, that the article corresponds in specie with the commodity sold, unless there are some facts and circumstances, existing in the cases, of which the jury under the direction of the court, are to judge, which clearly show, that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased, or where he may waive his right. Such for instance as in *Proser v. Harris*, 1 Stark. 140, where the property was sold by the name of saffron. The purchaser exam-

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ined it, with great minuteness, kept it six months, and then sold part of it. Although only three-fourths of it was saffron, still it was fair for the jury to infer from the inferior price, that was given for it, that it was such an article, as the plaintiff intended to purchase.

No such facts exist here. He had, it is true, an opportunity to examine the paints, as every purchaser has, but it does not appear, that he did examine them with great minuteness. He sold no part of them, and it does not appear he gave a full price for the paints. Of this, however, the jury under the direction of the court, are the competent judges.

The court further instruct the jury, that in order to support [*44] his *action, it is incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants.

If this had been an action to rescind the contract, there would be no doubt, the charge would have been right in this particular. And this was formerly the law on an express warranty, but it has been since ruled, that an action will lie without a return, or offer to return the property. And in this respect, I can perceive no difference between an express and implied warranty. It is said, injustice may be done to the vendor in sustaining a suit, before a return or offer to redeliver the property. It may be so, but the danger exists as well in the case of an express as an implied warranty. We must trust to the good sense and discrimination of the court and jury. This has heretofore been a sufficient safeguard in actions on an express warranty, and I see no reason to doubt, it will prove equally efficacious in actions of the latter description. That there may not be exceptions, I will not say, but I do not think this forms one of them. The measure of damages will of course be the difference between the value of the article delivered and the commodity sold.

GIBSON, C. J.—Where the article has been accepted after inspection or opportunity had, I prefer the rule of the common law to the modern approximations towards that of the civil law ; not only because it is a rule of the common law, but because it seems to be more convenient and just ; more convenient, because instead of attempting to deal with duties that are too subtle for judicial cognizance, it furnishes a plain test of the vendor's liability in two words, "warranty or fraud ;" and more just, because it pretends not to release the vendee from his bargain where it happens to be a bad one. The subject has been frequently agitated of late, and the superiority of the common law rule vindicated in a way that leaves nothing further to be

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said. The extent of its authority here was settled, it seemed to me, in *Ritchie v. Summers*, 3 Yeates, 534 ; *Kimmel v. Lichty*, Id. 262 ; *Willings v. Consequa*, 1 Peters' C. C. R. 317 ; *Calhoun v. Veechio*, 3 Wash. C. C. R. 165 ; *Jackson v. Wetherell*, 7 Serg. & Rawle, 482, and *Curcier v. Pennock*, 14 Serg. & Rawle, 51 ; which together seem to have placed it on the ground of *Chandelor v. Lopus*. From that case down to *Parkinson v. Lee*, 2 East, 314, it stood unshaken ; since when a flood of innovation in England and some of our sister states, has swept away all rule on the subject whatever. From the decisions to which I allude, I am unable to extract a single principle of general application. In some of them an advertisement, a sale note, or the bill of parcels, has been treated as the contract, and words that were used palpably to designate the thing sold, or at most to represent its quality or condition, were held, even in the face of an explicit stipulation to the contrary, to constitute an express warranty. Such I take to have been the case of *Sheppard v. Kain*, (7 C. L. R. 82 ;) where the representation of a ship as copper-fastened, was held to be a warranty of the fact, though it was an express condition *that the vendor should be answerable for no defect whatever. In *Salmon v. Ward*, (12 C. L. R. 94,) [*45] Chief Justice Best admits a difference between warranty and representation, yet takes for granted that the words, "this horse is sound," constitute a warranty, or at least afford evidence of it to be left to a jury. Thus qualified, his admission furnishes but a distinction without a difference, inasmuch as every representation contains an affirmation of the fact represented ; nor would the practical value of it be enhanced by allowing the jury to presume an express warranty from anything less than an express undertaking. In *Wood v. Smith*, 4 Car. & P. 45 ; s. c. 19 C. L. R. 267, the doctrine of constructive warranty was pushed a step still further, a naked affirmation of soundness having been held to constitute an independent, self-existent undertaking, though the vendor had positively refused to warrant the fact, or enter into any stipulation or engagement in relation to it. No one can help seeing the injustice of that. There was, indeed, evidence that the vendor knew of the unsoundness at the time ; but however that might have given a remedy against him for the deceit, it surely ought not to have subjected him to the consequences of a warranty. The Supreme Court of New York, though professing to adhere to the wholesome doctrine of its own decision in *Seixas v. Wood*, seems nevertheless to have fallen in with the current in declaring a direct affirmation to be an express warranty, or at least evidence of it to go to a jury. In *Chapman v. Murch*, 19 Johns. 290, it was held that an express war-

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ranty need not be in express terms ; but that any representation of the state of the things sold, or direct affirmation of its quality and condition, showing an intention to warrant, is sufficient. So in *Swett v. Colgate*, 20 Johns. 196, it is said to be essential that the affirmation appear to have been intended as a warranty, and not as a mere matter of judgment and opinion. But in the *Oneida Manufacturing Society v. Lawrence*, 4 Cowen, 440, it was held that to be evidence of a warranty, the affirmation or representation must not only be positive and unequivocal, but one on which the vendee relied. In most of the preceding cases, and others not particularly noticed, it seems to have been forgotten that the vendor is answerable for nothing beyond the soundness of the title, and the correspondency of a sample, where one has been used, to the thing sold, unless by force of an express warranty. In *Sands v. Taylor*, 5 John. 395, Chief Justice Spencer very accurately calls the warranty arising in a sale by sample, an implied one ; and what is the foundation of the implication ? Undoubtedly the affirmation of the seller that the part exhibited fairly represents the quality and condition of the whole. It is difficult, then, to imagine how any other than an implied warranty could arise from the assertion of any other fact. The covenant which arises from the assertion of a fact in a deed is, I believe, always considered an implied one. A naked assertion certainly does not express to the apprehension either of the unlettered or the philologist, an undertaking to make the

[*46] assertion good ; and to imply an express warranty, to *say nothing of the solecism, from words that do not import it either in a popular or a grammatical sense, is to deal unfairly with the rule which requires it. It is equally unfair to submit a naked assertion as evidence of intention, in order to let a jury draw from it as a conclusion of fact, what the court would not be justified in drawing from it as a conclusion of law. It must be admitted that it is the province of a jury to fix the meaning of the parties to a verbal contract, and that no particular form of words is essential to a warranty ; but it seems to me that it ought not to be inferred, even as a conclusion of fact, from terms which convey no such meaning to the popular apprehension. In the exposition of contracts, regard is to be had to the language, habits, and business of those who are the parties, in order to prevent them from being entangled in responsibilities which they never intended to create. There is no man, however unskilled in legal science, who does not know that a warranty means something more than a representation, and who would not, in the concoction of a bargain, make a difference between an assertion and an undertaking to make it good. Nor ought it, I apprehend, to strengthen the case of the buyer, that he had reposed on the judgment and

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word of the seller, as a security, because it would be unfair to permit him to do so without putting the seller on his guard as to the extent of the responsibility he was expected to contract from it. Were he to say explicitly that he meant to purchase on the judgment and at the risk of the seller, no one will doubt that in a vast majority of cases, the terms would be rejected. If, however, they would not, the parties knowing perfectly well what they were about, would enter into a contract of warranty, and no unfair advantage would be gained. But in the usual course of dealing, a chapman praises his commodity with no other view than to enhance its value in the eyes of his customer, who, in turn depreciates it with a view to cheapen it; yet it never enters into the head of either that the one buys, or the other sells, on any one's judgment but his own. A different course would put an end to everything like chaffering about the relation to the actual value to the price. It seems to me that the most fruitful source of perplexity in this part of the law, has been an injudicious desire to remedy a real or supposed hardship in particular cases, by straining the evidence to make out a warranty, where none existed in fact or in law. But an inconsistency quite as glaring as the implication of an express warranty, is found in the fact that a sale by sample is left on the old ground, the vendee being taken to buy on his own judgment both as to quality and specific character, and the vendor to undertake no further than that the sample corresponds to the bulk of the article. Why is the undertaking of one who sells by sample, satisfied by delivering an article of the same quality and character? Certainly because the vendee buys on his own judgment and at his own risk as to everything else; and I am at a loss to understand how the responsibility of the vendor shall be greater or different, where the article itself is exhibited. In other cases where there was in *fact no sale, but an agreement to sell and deliver an article of a particular quality by a day certain, the executory contract of the party seems to have been confounded with a present contract of warranty. Questions, too, have been determined on the ground of warranty that manifestly turned on that of deceit; as in the case of a sale by a manufacturer who is bound to know the quality of his wares and disclose it. These and other loose and inconsistent notions, would furnish a reason, if one were wanting, why we should not attempt to follow the modern decisions of other courts, in preference to our own. Though the distinction between quality and essential character is a novelty, I certainly prefer it to the want of all rule whatever observable in the modern cases; yet it seems to have little foundation in reason, and little to recommend it on the score of certainty and

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convenience in practice. It is difficult to comprehend why the vendee shall be taken to have bought on his own judgment as to quality and not as to essence; nor will it be easy to say how far a change may have been produced by adulteration, so as to authorize a jury to determine that the one denomination of the article has ended, and another begun. The object of the common law rule is to encourage trade, by preventing actions against all in turn through whose hands the article has passed in a course of dealing; but this object must be defeated by the rule now established, wherever the defect is in the essential character of the thing. I am therefore for adhering to the rule in *Chandelor v. Lopus*.

KENNEDY, J., concurred with the Chief Justice.

Judgment reversed, and a *venire de novo* ordered.

Cited by Counsel, 4 Wh. 352; 5 Wh. 330; 6 Wh. 91; 1 W. & S. 398; 3 W. & S. 268; 5 H. 319; 8 H. 431; 12 H. 191; 1 C. 311; 6 C. 528; 2 Wr. 496; 3 Wr. 90; 5 S. 282; 13 S. 28; 16 S. 386; 18 S. 150; 25 S. 231; 29 S. 396; 32 S. 182; 4 W. N. C. 493.

Cited by the Court, 3 R. 169; 2 W. 434; 9 W. 58; 10 Barr. 324; 7 H. 379; 10 C. 237; 3 Wr. 91; 25 S. 231; 26 S. 480; 2 N. 324, s. c. 3 W. N. C. 523; 2 N. 439, s. c. 3 W. N. C. 526; 9 O. 246.

The decision in this case established an exception to the rule of *Chandelor v. Lopus* (Smith's Ldg. Cas.), and the remarks of Mr. Justice Rogers go even further in attacking the common law doctrine. The principal case is authority for what it decided, but the remarks of Mr. Justice ROGERS must be taken with some modification: 3 Wr. 91; 8 W. 56 *et seq.*; 2 N. 439, s. c. 3 W. N. C. 526; but see 10 Barr. 324. Where there is a sale by sample or an inspection of the article itself, there can be no warranty implied from the bill of parcels; for in such a case the sample, and not the name given to it, is the standard by which the article is to be tested: 7 H. 379; 3 Wr. 91. But even in a sale by sample, the same rule applies as in the case of a bill of parcels, and there is no implied warranty that the quality shall be as that shown, but only that the goods delivered shall be of the same kind or species: 2 N. 324; s. c. 3 W. N. C. 523. See also 3 R. 169; 25 S. 231. Mr. Justice STRONG, speaking of the principal case, says it is one of those cases which are, perhaps, rather adjudications of what shall be considered evidence of an express engagement, than extensions of the doctrine of implied warranty: 10 C. 237. (For further discussion of this subject, see *Chandelor v. Lopus*, 1 Smith's Ldg. Cas. and notes; and Biddle on the Law of Warranties in the Sale of Chattels.)

[*48]

*[PHILADELPHIA, JANUARY 10, 1831.]

Appeal in the Case of Billington's Estate.

If the real and personal estate of a decedent are together sufficient to pay his debts, and leave a surplus to be distributed among his widow and children, the administrator is guilty of no misconduct in supplying out of the personal estate, the urgent wants of the widow and children, though that estate alone is not sufficient for the payment of the debts.

Where the estate of an intestate is considerably in debt, and debts to a large

[The Case of Billington's Appeal.]

amount are due to it, which cannot be immediately collected, and the administrator does not appear to have retained money in his hands an unreasonable length of time, he is not personally chargeable with interest paid by him, on debts due by the estate.

Where the administrator of an embarrassed but solvent estate, in the course of collecting doubtful debts by suit, is obliged to bid at sheriff's sales under judgments obtained by him, for lands of debtors who have nothing else to levy upon, in order to prevent a great sacrifice of the property, and it appears from all the circumstances attending the transaction, that he purchased for the benefit of the family, and was considered by them as having done so, and they not only made no objection to what he had done, but when he offered either to keep the land and account for the price of it, or hold it as their trustee, they returned no answer to his proposal, they cannot afterwards treat him as a purchaser on his own account, and make him account for the price, provided he has in making the purchase, acted with good faith and as a prudent man would have done in his own case.

And if the administrator has, under an order of the Orphans' Court, sold a portion of the real estate of the intestate, partly on credit, more advantageously than it could have been sold for cash, and afterwards being pressed for money for the purposes of the estate, he disposes of some of the securities he has taken for the price, at a discount, he is not personally chargeable with the discount, if under all the circumstances, he promoted the interest of the estate by doing so.

Counsel fees, and the expenses of the administrator in prosecuting suits, &c., for which no vouchers were produced, allowed under all the circumstances of the case.

AN appeal from the decree of the Orphans' Court of the city and county of *Philadelphia*, on the settlement of the accounts of Sarah Billington and Thomas Billington, administrators of the estate of Thomas Billington, deceased, having been taken to this court, auditors were, on the 15th of April, 1826, appointed "to report an administration account on the estate of Thomas Billington the elder, as well against the original administrators, as against the 'administrator *de bonis non*,' and on the estate of Sarah Billington, deceased, reporting specially the items, with a particular account, with explanations and observations, and to report what allowances should be made out of the distributive part of each child, for their maintenance and education, and payments, and receipts, and to state the balance due to, or by each child, after making the proper deductions: to report what lands Thomas Billington, the administrator, purchased on judgments obtained by the administrators, and the present state of the lands; whether disposed of by the said Thomas Billington and converted into money; whether disposed of by James Tatham, administrator *de bonis non*, or any other member of the family, and by whom, and in what manner the undisposed of lands are held, and also to report specially all such matters as either party may desire."

*The auditors made a very full and elaborate report upon the various matters submitted to them, to which [*49] sixteen exceptions were filed on behalf of some of the legal rep-

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representatives of the intestate, entitled to distributive shares of his estate. The estate being solvent, though embarrassed with debts to a large amount, no exceptions were filed on behalf of creditors.

The nature of the exceptions filed, and the circumstances out of which they grew, will sufficiently appear from the opinion of the court, which, after argument by *Newcomb* and *Tod* for the appellants, and *J. S. Smith* and *J. Sergeant* for the appellees, was delivered by

HUSTON, J.—Thomas Billington the elder, died in October, 1803, leaving a large real estate, personal property of reasonable amount, many debts due to him, and a long and large account of debts due by him; he left a widow and twelve children, two of whom were above twenty-one years of age, and the youngest two or three years of age.

His eldest son Thomas Billington, for some time before his father's death had not resided with the family in this city, but was manager for his father at a forge in Centre county. This son and the widow administered on the estate. Two inventories were filed, one of the personal property, consisting of household furniture in this city, and another of the stock and tools at the forge. The estate was of amount sufficient to pay all the debts, and to leave a large property for division among the children. In Mr. Billington's life the family had lived in a style, not of extravagance, but suited to a respectable and wealthy citizen.

The debts due to the estate could not be collected without suit. These suits were instituted in different counties, where the debtors resided. It is conceded that all proper exertion was used by Thomas Billington the administrator, to obtain judgment and executions, but from inability in the debtors to pay, and another cause which will be noticed hereafter, these debts have given rise to a principal question in this case.

In the meantime many of the creditors of the estate were urgent for the amount due them, and within a year after the administration, an order was obtained for the sale of a part of the real estate in this city, and a sale made, and the price paid and received according to contract; for the sale was part in cash, and the residue in instalments; and the creditors became so urgent, that the instalments were turned into cash by allowing a discount; another subject of complaint.

The forge in Centre county, and the houses in this city, were rented by the administrators, and the children supported by them, or rather by one of them, viz., Mrs. Billington. It is true, guardians were appointed, but one of them has been at

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Washington city, or in Europe in the service of his country, and the other, who was a lawyer of eminence, is dead. Neither of them ever did any act, as to leasing the property, or attending to the maintenance and education of the *children. [*50] There is little of fault to be charged on them on this account, for the mother of those children was a respectable woman, and their education, &c., is not alleged to have been neglected.

From this it will appear that the administrators, in one way or other, had in their hands the personal estate; the money arising from sale of lands, and that they, or one of them, collected the rents, and maintained and educated the children.

It will be observed that by our laws, the administrators, where letters of administration are granted, give bond and security for the faithful administration of the goods and chattels.

When an order is made on a deficiency of personal assets, to sell lands for payment of debts or maintenance of children, another bond with sureties is given for the faithful application of the money raised by the sale. The sureties in these several bonds are liable, each, for the due administration of the fund mentioned in the bond, and for no more.

And the guardian, in strictness, ought to lease the lands, and superintend, by himself or by contract, the maintenance and education of the minor children, and ought to have settled, in this case, that part of the account, with Mrs. Billington as their agent, and then to have settled their own account with each ward, and in the Orphans' Court; but in this case the guardians never acted; it does not even appear that they accepted of the appointment; both administrators are dead; we only know of the guardians that they were appointed, and that one of them, and the only one who was here, sanctioned the conduct of Mrs. Billington, for he was her counsel to support her conduct and her accounts until his death.

At one time the whole of these accounts of the administration of the goods and chattels; of the proceeds of lands sold by order of the Orphans' Court, and of maintenance of children, were blended in one account so that they could not be discriminated. After a partial hearing on that account, the whole matter was referred to auditors to report an "Administration account of the estate of Thomas Billington the elder, as well against the original administrators, as against the administrator *de bonis non*; and on the estate of Sarah Billington deceased, reporting especially the items with a particular account, with explanations and observations, and to report what allowances should be made out of the distributive part of each child, for their maintenance and education; and payments and receipts; and to state the balance due to, or by each child,

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“after making the proper deductions; to report what lands
 “Thomas Billington the younger purchased on judgments ob-
 “tained by the administrators, and the present state of those
 “lands; whether disposed of by the said Thomas Billington
 “and converted into money; whether disposed of by the said
 “James Tatham, administrator *de bonis non*, or by any other
 “member of the family, and by whom, and in what manner the
 “undisposed lands are held; and also to report especially all
 “such matters as either party may desire.” This very general,
 [*51] *and also very special reference was not solely the act
 of the court, but was modified to meet the wishes of the
 parties litigant, who were the children of some of them, and
 particularly Mr. Tatham, who married the eldest daughter, and
 who became administrator *de bonis non* of Thomas Billington
 the elder, and administrator of Mrs. Billington the administra-
 trix; and with him also was Dr. Morris, who married the second
 daughter. It is said some of the other children also complain.
 George, the eldest son since the death of Thomas Billington, Jr.,
 does not object to the account.

The auditors have reported a most elaborate and lucid state-
 ment on all the subjects referred to them.

The children have filed many exceptions; the bail in the ad-
 ministration bond have not filed any, but in argument have
 endeavoured to show some mistakes in the arrangement of the
 items in the several accounts; *i. e.*, that some debts set down as
 paid by proceeds of sales of land, were actually paid by pro-
 ceeds of personal property; and, secondly, they have insisted
 that the sum allowed Thomas Billington, Jr., for fees paid to
 counsel must be greatly too low.

The first and second exceptions are to the manner in which
 the auditors, in the Orphans' Court and here, have given credit
 for the inventories, here and in Centre county.

Mrs. Billington, finding her husband had died indebted more
 than she expected, disposed of the plate, and kept all the rest
 of the personal property. Eleven of the children were then
 living with her.

As to the stock and tools at the forge, Thomas Billington, Jr.,
 leased it most advantageously, and with it the stock and tools;
 such parts as were not within that description, he sold to the
 tenant at a price affixed by two iron-masters, and thus made
 more of them than probably could have been in any other way;
 and though the stock and tools are not charged to the admin-
 istrators in the account of the personal property, they are in
 the rent account.

In England, the personal property is all liable for debts in
 cases of intestacy, and must all be applied to the payment of

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debts before the land can be touched; and except for certain debts, land is not at all liable.

In this state, personal property, in case of intestacy, is also all liable for debts; but so also is land for every species of debts.

In the case of an insolvent estate, debts must be paid in a certain order, or the administrator may become personally liable, by paying debts of a lower grade, without leaving a fund to pay those of a higher; but if the estate is solvent, it is no *devastavit* to pay a simple contract debt in point of time, before a bond or judgment.

So again if an estate is insolvent, it is a *devastavit* if the administrator gives any of the personal estate to support the widow or children, (after he knows the estate to be insolvent at least,) but if, considering the real and personal estate, assets as they really are for payment of debts, he is certain there will be a large surplus after payment of debts to be distributed among the widow and children, it is *not misconduct to supply [*52] the present and urgent wants of the widow and children out of the only present fund, to wit, the personal property. Perhaps, indeed, a creditor might get a judgment against him for a *devastavit*, in strict law in such a case, but then he would stand in the place of that creditor for such sum, or he would have a claim personally against the widow and children, for the sum he had advanced to them, and could retain it out of their distributive shares.

It is, however, right in all cases that the administrators should keep their accounts so separated, as that the account settled will show the application of the proceeds of personal estate, and the proceeds of land sold by the Orphans' Court. And where there has been a wasting in fact or in law, of either of these funds, and their sureties are resorted to, it is necessary that they be separated, especially where creditors are the complainants. And where guardians have been appointed and have acted, the court will generally compel them to settle a rent account, and not take it in the first instance into the administrators' account.

In this case the debts are all paid, and the overplus, whether it arose from real or personal estate, is to be divided among the children; and if the administrators, or either of them, is in advance for the estate, that advance is to be taken out of the estate, whether real or personal, before distribution of the clear surplus among the children. It seems to me in this case to result exactly in the same way to the present objectors, whether they were supported by one hundred dollars taken from the personal fund, and that replaced by one hundred taken from

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the rents, or whether each one hundred dollars was applied strictly according to law. Taking the household furniture and beds, carpets, and kitchen furniture was one way of keeping the family together; selling all those articles and purchasing others on credit, to be paid for as rents came in, was another way of keeping the family together; and no one has said, or will say, the mother ought to have broken up housekeeping, and delivered her children to their guardians, to be put out to board with strangers.

It has not been, and it cannot be contended, that if this furniture, proper for that family in their circumstances, had been sold, any gain would have accrued from selling it and buying other furniture. To be sure, the two eldest daughters complained sometime after their marriage, not that it was improperly taken and used for the family while they were at home, but that it was kept for the use and benefit of the younger children, to their injury; but how are the facts? The auditors in the Orphans' Court report, that this property was all kept by the widow, and after being used in support of the children, distributed among them in her lifetime, or left to be distributed by her administrators; and the testimony of George Billington goes to prove that Mrs. Tatham and Mrs. Morris, the two eldest daughters, got at least an equal share in her lifetime. This report and testimony have not been impugned. There is then no hardship in this respect. George, the next eldest, makes [*53] no objection, but more, in his deposition, he *says, by the consent of all the family, the income of the estate was permitted to go into their mother's hands to support the family, nor was any objection or any claim ever made, to his knowledge, by any of the children for any part of it, (except by Mrs. Tatham, as before stated, in 1815,) who did not persist in it; that his mother had no other means of supporting the family but from his father's estate. Mr. George Billington seems to have reflected, that as he and the elder children had, during their infancy, been supported out of their father's estate, though in his lifetime, there was no very striking injustice in the case, if a little more was after the father's death, expended in maintaining and educating those who were left very young.

To conclude as to these exceptions, in this case or any other under the same circumstances, I cannot see on what principle the bail can be called on, or the administrators if alive. All the money raised from all the estate left by Thomas Billington is to be, and is accounted for; it must all be applied to some legal purpose, and if it does not appear to have been so applied, must be answered for. The answer to the children, and we have none others before us, is, it has been applied to the payment of

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debts, or to the support and education of the complainants. I appoint a man to collect money due me from two or more persons, and direct him to apply the money collected from one person to a particular purpose, and that collected from other persons, to another purpose; he collects my money, and applies it all as directed, but as he collected it, he threw it into one drawer, and did not keep it separate as ordered. I cannot recover damages from him for this, unless I have sustained damage.

The third exception here is, that as certain debts due by Thomas Billington at his death were not paid instantly, interest became due to the creditors on those debts, which interest, it is alleged, ought to be paid by the administrators out of their own pocket. To give any colour to this objection, it ought to have been shown, there were funds in the hands of the administrators to pay those debts. The debts due to Thomas Billington also bore interest, and when collected by the administrators, they are charged with the whole sum received including interest. There is no evidence that any money was retained by them in their hands an unreasonable time. In receiving and paying \$60,000, perhaps there was no one time, when 1,000 lay in their hands for even a few months. If the per cent. allowed the administrators is allowed at the end of each year, and the necessary expenses of suits, &c., I am not sure, the interest account, if made out, would not be the other way. We do not intimate that administrators retaining money are not to pay interest; we only say that on the face of this large and intricate account, there is no ground for a charge of interest against the administrators.

The 4th, 5th and 6th exceptions I shall take together, that judgments were obtained against William P. Brady, John Brady, and John Cummings, and the administrators are not charged with the *amount of those several judgments, but only with the sums actually recovered. It is not suggested, [*54] that the administrators were at all at any time negligent in pursuit of these claims, or ceased to levy and sell as long as the defendants had any property. If part of the debt was never collected, it is the loss of the estate, not of the administrator, who has been diligent, but they are charged with all the money ever received, and Thomas Billington, Jr., the administrator, seeing the property and the only property of the defendants, selling on his executions at a price far below what he believed was its value, bid for it. Some of it was struck off to him, and deeds made to him by the sheriff. And the 10th and 12th exceptions are that the administrators are not charged with the price, at which these lands were sold, and the interest. The referees have considered that these lands were bought, not for the administrator, but for the estate, and belong to the estate.

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This presents a question of some importance. There are cases which require from an administrator what in this country is unreasonable. Generally I agree that a trustee who changes the fund or the security does so at his peril, but I deny that this is universally the case; an administrator who releases a debt is generally liable for that debt, but not universally. A leasehold of 60 years was directed to be sold by the executor; the tenant in possession had a lease for thirty years of the time, was in arrear for one year rent, and insolvent. The executor released the year's rent due and gave him £20 for his lease; he believed this to be the best thing he could do for the estate, and so thought the Chancellor, and it was allowed him. "He did nothing but what was prudent." 3 P. Wms. 381.

An executor after consultation with the widow and such of the children as were of age, and taking legal advice, gave up for \$750 a leasehold, worth double that sum; he believed it was forfeited. He was sued for a *devastavit*, and held not liable for this act. 2 Johns. Cases, 376; though he was mistaken as to the title, and the lease was not forfeited.

In Hopkins' Reports, A. died possessed of the notes of a manufacturing company, whose affairs were in great disorder, whose works were stopped, and who were supposed unable to pay their debts. A new company composed of some of the old partners, and some who had not been partners, undertook to carry on the business, and pay the debts of the old company. The administrator of A. believing it best for the estate, gave up the notes of the old company, and took those of the new company, as did every other creditor of the old company. The new company immediately after failed, and the debt was lost. The Chancellor held the administrator not liable, for he acted honestly from the best information he could get, did what every prudent man acting for himself did, and ought not to be held answerable in such a case. If the first security had been unquestionably good, the law might have been, and I suppose would have been held otherwise.

[*55] *Conformably to the spirit of these cases, this court had made several decisions. *Bonsall's Appeal*, 1 Rawle, 270, is founded on these cases, and as understood and expressed in the report, does not go beyond them. I know the judge who dissented, chose to consider that case as deciding, that any guardian having money of his ward, might purchase land with it. The judges who decided the cause, did not so decide, nor do the words used import any such thing. There was no money paid; lands in which this ward had an interest were selling at what those heirs who were of age, and the administrators, one of whom was the uncle of the ward, supposed, was greatly be-

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low their value. At the instance of this uncle and those heirs, who were of age, the guardian agreed to join in the purchase, or more properly agreed to bid in the land for his ward along with others, rather than suffer it to go from her for much less than it was worth. The purity of motive in the guardian was not questioned by any but the judge who dissented. He was, under the circumstances proved and admitted in that case, held to be a trustee as to that land for his ward.

I proceed now to the circumstances attending these purchases of Thomas Billington, the administrator. The judgments in every case were against men deeply indebted, and when the lands which this administrator bought were gone, there was nothing on which to levy the residue of the debt. In this state of affairs, he writes to his mother with whom, or near to whom, lived the children who were then of age. That mother was the acting guardian of the minors. The gentleman who had been appointed their guardian, was the lawyer, the legal adviser of the administrators; though we have no evidence directly to prove that Mrs. Billington communicated this information of intention to those children, who were of age, or to the guardian. Thomas Billington, as he expected, was obliged to bid for the lands, or suffer them to be sold to others greatly below their value as he thought, and as there were no other funds on which to levy the debt, that debt so far as it was not covered by the sale, was lost; some lands of each of the three debtors named, were struck down at his bid, and the sheriff's deeds made to him. Of this he immediately informed his mother. No objection to this is made by any person at that time. Some years after, he is called on to settle his account, and understanding that some difficulty as to these purchases was made by some of the family, he sends them in writing a statement how he bought, and an offer, if the family agreed, to take those lands as his own property, and account to the estate for the price bid. This is not agreed to, nor rejected, so far as we know. Soon after Thomas Billington, Jr., and his mother file an administration account, in which they are not charged with the price of the lands so bought; this was 1815. The next year, George Billington goes to see Thomas on the affairs of the estate. I assume it, and I have a right to do so, that he went at the instance, and as the representative of the family, most of whom were then of age; and then and only once then, Thomas who had become at times intemperate, in a moment of intoxication, *and of irritation at what he thought harsh treatment from the family, [*56] said, the family had treated him so badly, he would keep what he had bought. This, says George, was the only time he ever evinced any disposition to do wrong. Again the same witness

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says, I always understood that he had purchased in the property, because it would not sell, and that he could not sell it; and again, that which he bought he did not buy for himself; he bought for the estate to prevent sacrifice, I believe.

On the whole then it appears, that the administrators, or one of them, in the course of collecting some desperate debts, were obliged to bid for some of the land of their debtors when it was selling; that where they thought anything like a fair price was bid by any other person, that other person got the land; where the price bid was greatly under the value of the property, and nothing of the defendant's left from which to collect the residue of the debt, it was bid in for the estate. It appears that where any of this land has been since sold, it has been at an advance. It appears that at the time, and after the purchases, the other heirs knew of what had been done; that although some of them at one time called for the price bid, yet when a written proposition was submitted, no answer was given, and thus Thomas Billington was kept from improving or using the lands as his own.

It appears that George Billington, who stands before us as a man of candor, and sense, and truth, was sent up as to this, and other business, (I say sent, for Tatham charges his expenses, and none of the children object to such charge,) that he at all times considered Thomas as the purchaser of those lands for the family, and not himself, and such must have been the views of those who employed George, or it could not have struck him as wrong for Thomas to say the family had treated him so badly, he would keep the lands. At that time the family considered those lands as the general property, and Thomas Billington their trustee; he did not use or sell them; he died, and whatever might have been the case at one time, it is too late for the heirs to say, he purchased for himself, and at his own risk, and we will not take the lands. It would be dishonest to claim the lands as belonging to the estate in 1816; to call it a fraud in Thomas at that time to hint that he had the power to keep them himself as his own, to prevent his selling them, to insist he was a trustee, and after his death, to assert the contrary in every respect, and call on his infant child to do what they would not permit its father to do. The report is in this respect affirmed.

It is singular Mr. Tatham, who became the administrator *de bonis non*, has done the very thing which here he objects to, and to five times the amount of Thomas Billington's purchases. To be sure he got the assent of some of the heirs in writing, but not of all the heirs. I do not mention this as any ground of our decision, but as a matter on which the appellants may reflect.

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We decide on the ground, that it was prudent, perhaps necessary, in order to collect those debts, to bid *something, and to buy in property going too unreasonably below its [*57] value; that when some doubts as to this matter existed, and Thomas Billington offered distinctly to keep them himself, or hold them in trust, there was no answer; that two or three years after, when all, or all but one, were of age, the whole family considered him a trustee for them, so much so that it was a crime in him to dispute it for a moment, and his conduct being once ratified by the other heirs, they are bound. Perhaps under the peculiar circumstances of this case, they would have been compelled to accept him as a trustee against their consent. We agree entirely with the general position, that an executor, administrator, or guardian, cannot change the property from real to personal, or the contrary, or accept the security of one person, and give up that of another, or release a debt, without receiving the amount, unless at his own risk. This is the law in all ordinary cases, and where the interest of the estate, or of the ward, was safe by adhering to this rule. But cases may occur, and do often occur, where a debt will be totally lost to the estate by an executor, who adheres to this rule as the only safe one, and yet the debt or the greatest part of it could be secured by accepting an assignment of securities on other persons, or by executing a release in full where part only is paid. Now, as the general rule was introduced for the benefit of the *cestui que trusts*, it would seem strange if it could not be dispensed with, when their interest requires that a different principle should be adopted. The executor, or administrator, or guardian, must show, that the circumstances required the exercise of a sound discretion; that from all the information and advice he could obtain, the estate would sustain a total or partial loss, unless he exercised a discretionary power, and that what he did was what he really thought best, in the case as presented, what he or any prudent man would do in his own case; that his motives were pure, and his conduct prudent, and if he can do this, it is not easy to see on what principle he can be charged personally.

These observations apply to, and answer the 9th exception, which is, that the administrators have tried to sell the brewhouse for cash, and not succeeding, they sold it on credit as to part of the price, and afterwards, being pressed for money, sold the two last bonds of \$1,222.23 each at a discount so as to occasion the product to the estate to be about \$120 less than if the bonds had been retained until due. The guardians, I have said, were the counsel of the administrators, and we may take it, advised this as preferable to selling more property at that time, or suffering creditors to sell on execution. We do not, under the

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circumstances of this case, see that the report is wrong in this particular.

There are two or three objections to the arrangement of the items of debit and credit, in the account; that is, the appellants insist, that all the deficit should be thrown on that part of the account, which is composed of the personal estate; in other words should fall on the bail of the administrators in the administration bond. This case, as we *have considered it, [*58] makes these objections immaterial. They are also immaterial as no default is found in the administrator, but I will observe, that in 1815, all the heirs were of age, except two; that, by the consent of all the family, says George Billington, the whole of the rents were permitted to go into the hands of Mrs. Billington, and all received from her their support and education; that the guardians acquiesced in this, and were never called to account, nor was Mrs. Billington, during her lifetime, as to this particular. Now to permit this large account of rents and maintenance, with which the bail in the administration bond had nothing to do, and for the management of which they were never answerable, to be either totally overlooked, or so arranged as to find no default in it, and throw every alleged default on the other parts of the account, in order to fix the bail, would be inconsistent with my notions of the exercise of equitable power, and different from the exercise of it in other tribunals. There is nothing in the arrangement of the items in the different accounts, of which the appellants can complain, or if there is, there are items to a greater amount which might be transposed in favour of the bail.

The amount allowed Thomas Billington, Jr., for expenses, and counsel fees, is objected to by the appellees as too small, and by the appellants as too large. An administrator ought always to take vouchers for money paid, and to keep an exact account of time spent in the business of the estate. Thomas Billington filed an account in 1815, expressly stated not to be final. In this no charge was made for expenses, counsel fees, or percentage for receiving and paying money; soon after he died. The person who administered on his estate, says, he delivered all the papers, &c., to the administrator *de bonis non*; that is, to the appellants. I do not mean to insinuate that anything has been suppressed by them, but there may be many letters, memorandums, &c., from which, with a little explanation, vouchers might be obtained, and there may be circumstances from which the payment of money may be certainly inferred. I was examined, and stated from my memory, having no notice to examine vouchers, that I had received \$150 as counsel fees in two cases. The discussion here has brought to my recollection another case

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in which I was concerned, and for which I was paid. Judge Duncan had been counsel in several cases, and he says, the counsel were paid for their services, but mentions no sum; he proves that Mr. Watts, and others were employed, and I take it, were paid, or demand would have been made of the administrator *de bonis non*. We have then evidence of nine suits brought and ended under the management of Thomas Billington, Jr., several of them of large amount, and warmly contested; one tried three times, and yet an allowance of only \$300 for counsel fees, and \$2,480 the whole amount allowed for attention, expenses, and payment of taxes from 1803 till 1814.

The administrator *de bonis non* collected \$2,400 from two debtors, and paid taxes four or five years; sold and purchased in for *the estate, Rees's lands on a judgment obtained by [59] Thomas Billington, and charges about \$2,200, more than half of which is for counsel fees; yet he was the principal appellant as to the allowance to Thomas Billington. I feel compelled to say, there is in this case evidence, which would have justified the allowance of a larger sum on the item of counsel fees to Thomas Billington, Jr.; we therefore allow an addition to this item of seven hundred dollars. I am aware of the danger of the precedent of allowing to an administrator, credits for which no vouchers are produced. In this case Thomas Billington, Jr., is dead; his widow is dead; his brother-in-law, Mr. F. B., who administered, is dead; C. Hall, Esq., who was guardian of his infant child, is dead; the counsel who were concerned for Thomas Billington, Jr., as administrators, are, except myself, dead. And every paper and memorandum from which an account could be made, have been long in the possession of one of the complainants. Under these circumstances we have in this case made the allowance.

Cited by Counsel, 3 W. 370; 7 W. & S. 112; 1 Barr, 57; 1 J. 38; 11 C. 421; 12 C. 97; 1 G. 400; 1 Wr. 325; 7 S. 51; 31 S. 253; 7 W. N. C. 530; 11 W. N. C. 294.

Cited by the Court, 2 Barr, 469.

[PHILADELPHIA, JANUARY 10, 1831.]

Paxson *against* Lefferts and Another.

IN ERROR.

Testator devised as follows, viz: "I give to my son C. K. my messuage and plantation, situate, &c., which I had from my father, with the buildings, &c.

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with the rents, issues, to him during his natural life, and if he shall leave lawful issue, then to them, their heirs and assigns forever; but for want of such lawful issue, then it shall return to my son J. K.; and if he should leave no lawful issue after his decease, then to my next lawful heir, and to their heirs and assigns forever."

At the date of the will, the testator had another child, a daughter. C. K., the son, at the time the will was made had no issue, nor had he any subsequently until after the death of the testator.

Held, that C. K. took an estate tail.

IN the Court of Common Pleas of *Montgomery* county, from which the cause was removed to this court by writ of error, this was an ejectment for a messuage, mill, and tract of land, in Abington township, in which the defendants in error, Elizabeth Lefferts and Susanna Addis were plaintiffs, and the plaintiff in error, Jacob Paxson, was defendant.

At the trial in the court below, on the 27th November, 1827, the following facts were, by the consent of counsel, found by the jury in the form of a special verdict.

On the 5th January, 1761, John Knight, being seized in fee of the premises laid in the declaration, made his last will and testament in writing, duly proved, in these words, viz.:

[*60] "I, John Knight, of the city of Philadelphia, baker, being weak of body, but of sound and perfect mind and memory, (blessed be God,) do this fifth day of January, in the year of our Lord one thousand seven hundred and sixty-one, make and publish this my last will and testament in manner following: *Imprimis*. My will is, that all my just debts and funeral charges be first paid and satisfied. *Item*. I give to my son Charles Knight my messuage and plantation situate in Abintown in the county of Philadelphia, the which I had from my father, with the buildings and apurtinances thereunto belonging, with the rents, issues, to him during his natural life, and if he shall leve lawfull issue, then to them their heirs and assigns forever. But for want of such lawfull issue, then it shall return to my son John Knight, and if he should leave no lawful issue after his deceas, then to my next lawful heire and to their heirs and assigns forever. And I give to my wife one equal half part of the rent of s^d messuag or plantation after my said son Charles deceas during her natural life, and likewise I give to my son Cherls my new bakehous situate in fourth street between James Dilworth on the north, and Matthew Cline on the south side, to him his heirs and assigns forever, under the yearly ground rent of forty shillings a year.

"*Item*. I give to my daughter Rachel my house in Sasifrax street where John George now lives in, with the loot of ground thereunto belonging, the which is thirty-three feet front on the street, and a hundred and fifty foot back, with the apurtinances

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thereunto belonging, to her and her heirs and assigns forever, and two fether beds and bedding.

"*Item.* I give to my son John Knight my two messuages or teniments in Sasifrax street, with the loot of ground as they are built on thirty-four feet front on said street, and a hundred and fifty foot back, be it more or les, under the yearly ground rent of thirty shillings starling a year, and the house as I now liveth in after his mother's deceas, the which house is at the corner of Mulberry and fourth street, with the bake house granereys, and all the apurtinances thereunto belonging, to him his heirs and assigns forever, under the yearly ground rent of sixty-two shillings and sixpence a year.

"*Item.* I give to my dear wife Elizabeth Knight, my house as is in Mulberey street adjoining my corner house as I now lives in, with the aley and the conveniances thereunto belonging, under the yearley ground rent of thirty-five shillings a year, my loot of ground as I bought of Magdalen Brown, containing two acres a quarter and half quarter, in Passyunk township, with the privilidges to me granted, my loot of ground in Sasifrax street, containing in breadth thirty-three feet front on said street under the yearly ground rent of three pounds six shillings starling a year, and my two loots of land as I bought of John Cox and Thomas Wood in Abintown, to her and her heirs and assigns forever, she paying my just debts and funeral expenses out of it, and the corner house as I now lives in at the corner *of Mulberry and fourth street, I give to her, with the [*61] bake house, granareys, stable and other convenienceyes thereunto belonging, during her natural life, and the rent issues and profits of my son Charlses land and teniments until he attains to the age of twenty-one years, and likewise the rents issues and profits of my son John's teniments, until he attains to the age of twenty-one years, and all my negroes, with all my other estate not heretofore willed or given away, both real and personal whatsoever, to her and her heirs and assigns forever, & my will is, and I do order that my son Charls shall have six months schooling next after my decease, and then be bound to a trade as he shall choose, and that my son John shall be kept to school until he is fifteen years old, and then to be put to a trade as he shall choose. And I do hereby order, and my will is, that my executor hereafter named shall have full power to binde out my said sons. And of this my last will and testament I make my said dear wife Elizabeth Knight sole executrix, hereby making null and void all former and other wills by me made at any time heretofore. In witness I have hereunto set my hand and seal."

The testator afterwards, in the same year, died so seized. At

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the time of making his said will, the testator had lawful issue then living, to wit, Charles Knight, his eldest son, Rachel Knight, and John Knight, and no other. Charles, the son of the testator, had no child at the time of making the said will, nor any born during the lifetime of the testator. After the death of the testator, and before the year 1770, Charles Knight had lawful issue, four children, to wit, John, Elizabeth, Susanna, and Rachel. He had no children born during the year 1770, but after that year other lawful issue, to wit, William and Sarah, and no other children. John the eldest son of Charles, has not been heard of for fifteen or sixteen years; Rachel died before her said father, and William Knight also died before his said father, both intestate and without issue; Sarah died about five or six years ago, intestate, having married —— Shaw, and never having had any issue. Elizabeth intermarried with James Lefferts, during the lifetime of her said father, and was under age at the time of her said marriage. Susanna intermarried with Josiah Addis, during the lifetime of her said father, and was under age when she so married. Josiah Addis died about five or six years ago, and James Lefferts about two or three years since. The wife of John, the testator, is also deceased.

Charles Knight suffered a common recovery of the premises in 1770, and afterwards by deed dated the 6th day of April, 1774, conveyed the premises for the consideration therein mentioned to Andrew Keyser. Andrew Keyser, by deed dated 28th day of September, 1792, conveyed the same for the consideration therein mentioned, to Jacob Paxson, the defendant, who has been in possession of the premises ever since.

Charles Knight died in the month of August, 1793. About [*62] the *year 1794, an ejectment was instituted for the recovery of the said premises, under the title of the present plaintiffs then *femes covert*, on which a nonsuit was afterwards had. The defendant erected valuable improvements on the premises, both before and after the said suit, and the plaintiffs knew, at the time the said suit was instituted, that the defendant was erecting on the premises the dwelling house in which he now resides, and the barn belonging to it.

The deed of the 6th of April, 1774, from Charles Knight to Andrew Keyser, contained the following covenant, viz.:

“And the said Charles Knight for himself, his heirs, executors, and administrators, doth covenant, promise, and grant to, and with the said Andrew Keyser, his heirs and assigns, and every of them by these presents, in manner and form following; that is to say, that he the said Charles Knight and his heirs, the aforesaid messuage or tenement, grist mill, mill race, tracts, parts and pieces of land, hereditaments, and all and singular the

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premises hereby granted, bargained and sold, or mentioned or intended so to be, with their and every of their appurtenances, unto the said Andrew Keyser, his heirs and assigns, against him the said Charles Knight and his heirs, against the heirs and assigns of the said John Knight the father, deceased, and against all and every other person or persons, whomsoever, lawfully claiming or to claim by, from, or under him, them or any of them, shall and will warrant, and forever defend by these presents."

By consent of counsel, the court below, without argument, gave judgment for the plaintiffs, upon which the defendant sued out a writ of error.

Rawle, Jr., for the plaintiff in error, contended,

First. That Charles Knight, the devisee of the land in dispute, under the will of his father, John Knight, took an estate tail by implication, with remainder in tail, to the testator's second son John, remainder in fee, to the heirs of the testator, and that this estate tail was barred by the common recovery suffered in the year 1770, by Charles to the use of himself in fee. Such an estate vested in him by virtue of the rule in *Shelly's Case*, by which, wherever the ancestor takes an estate of freehold, and a remainder is thereon limited in the same instrument, to his heirs, the heirs of his body, (or which is the same thing, his issue,) such remainder is immediately executed in the ancestor. Without inquiring into the comparative soundness of the opinions of those, who with Mr. Hargrave, Lord Thurlow, and others, maintain this to be an absolute, imperative, unbending rule of law, which rides over the intention of the testator, and of those, who with Lord Mansfield and others, consider it of a more flexible and yielding character, it may be safely affirmed to be a fixed and settled rule of construction, binding upon courts, unless the intention of the testator plainly appear to be incompatible with it. In the will under consideration, no estates are given, inconsistent with the application of the rule; on the contrary, it is impossible to give full effect to the *intention of the testator, without its aid. In this, as [*63] in every other instance in which similar language is used, the testator no doubt intended to give only an estate for life to the first taker: but he also intended to give other estates, which could only take effect, by merging the estate for life, to Charles, in the inheritance; and the particular must give way to the general intention. This is the conclusion at which we must arrive, if we look only at the devise to Charles, apart from everything else. It is fortified by the devises over to John and the heirs of the testator, and receives much additional strength,

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by reference to other parts of the will. How would the case stand upon the devise to Charles alone? In determining this question it is necessary to inquire, First, How it would be if there were no limitation engrafted upon the devise to the issue? Second, What is the effect of these words of limitation? Omitting the words of limitation superadded to the devise to the issue of Charles, the devise would be to Charles for life, and if he should leave issue, then to them, but for want of such issue, over. At the time of the devise, and until several years after the death of the testator, Charles had no issue. The testator, therefore, could have had no particular person in view, but intended that the estate should pass from Charles to such persons as could make title to it as his issue, that is, as the heirs of his body; for wherever the term issue is used in reference to persons not *in esse*, it is synonymous with the term heirs of the body. Wylde's Case, 6 Rep. 17; 4 Bac. Ab. 261; Preston on Estates, 379. The words "if he shall leave issue," and "for want of such issue," are uniformly construed to mean an indefinite failure of issue. Such language does not refer to issue living at the death of the first taker, but looks to the whole line of descent from him, and gives him an inheritance. By force of these words an express estate for life is often enlarged to an estate tail, and an estate in fee is cut down to an estate in tail. Irwin v. Dunwoody, 17 Serg. & Rawle, 61; Caskey v. Brewer, Ib. 441.

As strong a case as any other in support of this principle is that of Robinson v. Robinson, 1 Burr. 38, in which the devise to the first taker, was not only expressly for life "and no longer," but an estate was afterwards given to his son, yet by force of the words "for default of such issue," it was held to pass an estate tail. Many other English decisions, both before and since the Revolution, support the same position; but it is unnecessary to cite them, as abundant authority for it is found in our own books. James's Case, 1 Dall. 47; Lessee of Evans v. Davis, 1 Yeates, 332. What effect have the words of limitation engrafted upon the devise to the issue of Charles upon the estate given to him? There are cases, certainly, in which the addition of words of limitation to a devise to the heir, after an estate for life to the ancestor, will convert the heir into a purchaser. The learning on this subject is extremely subtle and refined. Distinctions are sometimes taken, where the difference is not very perceptible. But it may be safely averred, that there [*64] is no case of a devise to one for life, and after *his death to his heirs, to the heirs of his body, or to his issue, in the plural number, with words of limitation superadded, in which such heirs, heirs of the body or issue, have taken as purchasers,

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unless the course of descent indicated by the superadded words, was different from what it would have been if the inheritance had vested in the first taker. In all the cases on which this doctrine rests, the devise was to the heir in the singular number, who was thus described as the stock in whom the inheritance was to commence, or the engrafted words carried the estate into a different channel of descent. In Archer's Case, 1 Co. R. 66, the root from which this doctrine sprang, the limitation was to A. for life, and after his decease to the next heir male of A., and the heirs of the body of such next heir male, and the devise to him was held to be a remainder by purchase. Luddington v. Kime, 1 Ld. Ray. 203, perhaps the most prominent case on the subject, went upon the same ground. The devise was to Sir Evers Armin for life, without impeachment of waste, and in case he should have any issue male, then to such issue male and his heirs forever, and if he should die without issue, then to Sir Thomas Barnardiston in fee. Here were several circumstances which marked it as an exception to the rule in Shelly's Case. There was not only an express estate for life, to Sir Evers Armin, but it was without impeachment of waste, words much relied upon by the court, and which would have been nugatory, if he had taken an estate of inheritance. The devise of the remainder was to the issue in the singular number, which was held to be *designatio personæ*, pointing out the individual who was to take the inheritance, after the estate for life was spent. The same feature will be found in all the cases, in which the superadded words have been held to convert words of limitation into words of purchase. Fearn on Rem. 193. There are many cases very analogous to that now under consideration, in which words of limitation engrafted on a devise to heirs, heirs of the body, and issue in the plural number, have put the estate in a course of descent from the first taker, by the operation of the rule in Shelly's Case. Goodright v. Pully, 2 Ld. Ray. 1437; Wright v. Pearson, Ambler, 358; King v. Burchell, Ambler, 379; s. s. 4 T. R. 296, note; Morris v. Le Guy, cited in Doe v. Laming, 2 Burr. 1102, and in Denn v. Puckey, 5 T. R. 302; Dodson v. Grew, 2 Wils. 322; James's claim, 1 Pall. 47, already cited for another purpose, is also an authority to show, that words serving to limit the fee to the issue of the first taker, do not convert the issue into purchasers. The case of Carter v. M'Michael, 10 Serg. & Rawle, 429, in which this branch of the law is fully considered by the court, is conclusive on this point. The conclusion to be deduced from all the authorities is, that the word issue in a will, when used in reference to persons not then born, and not used in the singular number to describe a particular person, but in the plural number to point out the line of

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descent, is synonymous with the words heirs of the body, and that words of limitation engrafted on a devise to the issue of [*65] the devisee for life, never make *the issue purchasers, though such words serve to limit a fee and not a fee tail. They have this effect only where they would carry the estate into a different channel from that in which it would flow, by giving to the first taker an inheritance. There are no authorities, which impugn this doctrine, though there are some, which vary the uniformity of the rule, which governed Archer's Case. In *Fearne*, 181, 182, 183, 184, 193, the cases are very elaborately reviewed, and this is the shore, on which the doctrine is landed.

Admitting, that under the first branch of the devise to the issue of Charles, and their heirs, they would have taken as purchasers, yet the devise over to John for want of issue of Charles, and the second devise over to the testator's heirs on the failure of the issue of John, make it inconsistent with his general intention, that the issue of Charles should take in any other way than by limitation, and consequently Charles took an estate tail. This conclusion is fortified by the situation of the testator's family, and the other dispositions of his property. He had two sons, Charles and John, and a daughter, Rachel. To his eldest son, Charles, he devises the paternal estate, and declares that if he shall not leave issue, it shall return to his second son John, and upon failure of his issue, shall go to his own next lawful heir in fee. Independently of the established rules of construction, some light may be gathered as to his intention, from other parts of the will. At the time of the devise, Charles was a boy, and could not have forfeited the good opinion of his father. It is impossible, therefore, to suppose, he meant to make a worse provision for him than for either of his other children, yet that would be the case, if Charles took only an estate for life. He would only have had an estate for life in the plantation, and a back bake-house, while John would have had two houses in *Sassafras street*, and the testator's dwelling-house, at the corner of *Mulberry and Fourth streets*, besides the patrimonial estate in tail, in the event of his brother's death, without issue. The testator could have had no motive for thus, as it were, disinheriting his eldest son, who was as dear to him at least as his other children, and to whom, according to the habits and prejudices of that day, it might be supposed, he would give a preference, if he made any distinction between his children. He manifested a strong inclination to keep this estate, "which he had from his father," in his own family and name, and with this view, he made provisions by his will, as many others have done, which the law would not permit to

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take effect exactly in the manner intended. No doubt, he intended, that Charles should enjoy the estate only for life, without the power of alienation, but he also intended, that it should pass through the whole line of Charles, for he never could have meant, that his son, whom he knew and was attached to, should have a circumscribed estate, comparatively of little value, and that the moment he died, his issue, whom the testator never saw, should become absolute masters of it. Common reason, and the first principles of our nature negative such an idea. He plainly meant, that all the issue of Charles should take *in succession, and that when his line was ex- [*66]hausted, it should pass to the line of John, or as he forcibly expressed it, return to John. He thus manifested his fixed determination, so far as he could, to keep the estate in his family name. He first puts it in the channel of his eldest son's blood, and after it has passed through that, makes it return to that of his second son, and when that is exhausted, he places it in the line of his next heir, which is the line of Rachel, to which he gives a fee. The reason for this distinction is obvious. When the estate passed into the line of the daughter, it could no longer be connected with the family name, and, therefore, he was indifferent whether it continued in that line or not.

It is impossible to doubt, that he intended, that Charles and John should enjoy the estate in exactly the same way; and it is equally impossible to doubt, that the devise to John passes an estate tail. If, therefore, there existed any doubt as to the devise to Charles, standing by itself, that doubt would be removed by connecting it with the devise to John. By construing the words of the devise to Charles, to be words of limitation, effect is given to every part of the will, which cannot otherwise be done. If they are words of limitation, Charles takes an estate tail, remainder in tail to John, remainder in fee to the heirs of the testator; but if they are words of purchase, the devise over to the heirs of the testator must be defeated. If the devise to Charles, gave an estate for life, the devise to John might take effect as an executory devise, because the contingency, on which the estate would go over, would be the death of Charles without issue living at his death; but it would not go over to the heirs of the testator until after an indefinite failure of the issue of John, a contingency too remote for the rules of law to permit. Fearn, 444; 2 Bl. Com. 173, 174. As then this limitation over can take effect as a remainder by giving an estate tail to Charles, and cannot take effect at all, if Charles takes only an estate for life, with remainder in fee to his issue, the devise to Charles must be construed so as to pass

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an estate tail in order to effectuate the general intent of the testator.

2. If, however, the true construction of the will be, that a general failure of the issue of Charles was not contemplated by the testator, then his intention must have been to give the estate to such issue as Charles might have living at the time of his death, and, in that case the remainder was contingent. At the time of the devise, Charles he had no issue. At the time he suffered the common recovery, had issue, and other issue was born afterwards. But at the time the recovery was suffered, it was uncertain, what issue he would have at the time of his death, which was the period at which the remainder was to take effect. A criterion by which to determine whether a remainder is vested or contingent is the power of alienation. If it be vested, the remainder man may dispose of it. Now the issue of Charles, though born before the recovery, could not aliene the remainder, because it was uncertain what other issue their father might have, and consequently what would be the share of each. Everything must rest in contingency until the [*67] death of Charles. *Abbott v. *Jenkins*, 10 Serg. & Rawle, 296 ; *Stump v. Findlay*, 2 Rawle, 168. If the remainders were contingent, they were destroyed by the recovery, which worked a forfeiture of the estate for life. *Lyle v. Richards*, 9 Serg. & Rawle, 322.

3. The ancestor, Charles, aliened the estate with express warranty, which has descended upon the plaintiffs below, as his heirs, who cannot claim in opposition to the warranty. This is a lineal warranty, because it descends from an ancestor, from whom the title to the estate might have descended. But admitting it to be a collateral warranty, the heir is bound by it. In Pennsylvania a collateral warranty, by tenant for life, even without assets, binds the heir. It was so at common law as respects all collateral warranties. 2 Bl. Com. 301 ; *Shep. Touch.* 188, 189, 194. By various acts of Parliament, of which some are, and some are not in force in Pennsylvania, the law at this day is different in England. By the statute of Gloucester, 6 E. 1, c. 8, warranty, by tenant by the curtesy, does not bind the heir without assets in fee simple. And the statute 4 Ann. c. 16, sec. 21, puts an end to all warranties by tenant for life. Independently of the statute of Anne, the warranty contained in the deed of Charles Knight would bar the entry of his heir, even in England, and that statute has not been extended to Pennsylvania. *Eshelman v. Hoke*, 2 Yeates, 509 ; *Jourdan v. Jourdan*, 9 Serg. & Rawle, 269. The objection raised in the last-mentioned case, that a warranty descends only upon the

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heir at law, has no room in this case, because the plaintiffs below were together his heirs at law.*

* The Reporter has been favoured by a friend with the following note:

Warranty of land, in its strict sense at common law, is so little known in practice among us, that it is hoped the introduction of a few remarks on the subject will be excused.

The difference between lineal and collateral warranty, is not so distinctly shown in Blackstone's Commentaries, as in Coke on Littleton, chapter Warranty, which he who wishes to understand this subtle and almost obsolete branch of the common law should consult with great attention.

An express warranty could only be created by the word *warrantizo*, Litt. § 733. Whether express or implied it operated in two ways:

1. The warrantee could implead the warrantor either before or after the eviction. The former is one of the few cases at law, of the suit preceding the injury, which were called *brevia anticipantia*. Coke on Littleton, 109, a. Fitzherbert in the Natura Brevium, 312, says, it is good policy to bring the *warrantia chartæ* before being sued, as it binds the lands of the warrantor which he held at the time the writ was sued out. This, however, would be a very inconvenient rule at the present day, and in this country, where the alienation of lands is so much more frequent than it was in feudal times.

A writ of *warrantia chartæ* was only resorted to when the warrantee was sued in an action in which he could not vouch, as in an assize, or in a writ of entry in the nature of an assize. Fitz. Nat. Brev. 310.

But whether the warrantee proceeded by voucher or by *warrantia chartæ*, the heir at common law was the only ostensible or nominal party in the first instance.

2. Warranty, however, also operated in another manner, which is designated in the old books by the name of a Rebutter, Coke on Litt. 36, a. It defended the warrantee against the claims of the warrantor and his heirs, and this, as justly observed in Shepherd's Touchstone, on the principle of avoiding circuity of action.

In this country, where descents are partible, great inconvenience and injustice would ensue from applying the rule, that a warranty bound only the heir at common law, in the operation of a warranty by way of rebutter.

The analogy between the custom of gravelkind, and our system of descents, affords an exposition which we cannot but adopt. It is true that the text of Littleton is express, that a warranty of lands held in gravelkind, descends only on the heir at common law, and shall not bind "the heirs that are heirs according to the custom." Litt. § 736. The same rule applies to land held in borough English. Ib. § 735. In the latter instance the case, as put by Littleton, appears extremely hard on the purchaser. The youngest son of the tenant in tail, who discontinued with warranty, was not barred, although land to an equal or greater amount in value had descended to him from his father. But the subtle notion of the descent of the warranty on the heir at common law alone, productive of such injurious effects, was got rid of by an ingenious contrivance for the promotion of justice. Although the customary heir was not considered directly liable on the warranty, yet he was held so by reason of the inheritance. See Coke on Litt. 376, a. And either by being directly vouched by the warrantee, or by being vouched by the heir at common law, in case the latter alone had been vouched, neither of which courses was at the election of the warrantee) the customary heir could be rendered liable. See Robinson on Gravekind, 127; 1 Leon. 112; Cr. Jac. 218; Coke on Litt. 12, a; Mr. Hargrave's notes, 1). The principle applies with double force in the case of a rebutter. It cannot be conceived that a gravelkind heir, or the youngest son in a case of borough English, who would thus be made responsible if the warrantee were evicted by a stranger, should not be rebutted in case he claimed the land himself, when the warrantee could thus circuitously recover the same land from him afterwards.

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[*68] *4. The entry of the plaintiffs below is barred by the act of limitations of 26th March, 1785, Purd. Dig. 532. Their right of entry accrued in the year 1770, when their father suffered the common recovery, by which his life estate was for-

In the case of Jourdan v. Jourdan, 9 Serg. & Rawle, 268, the attention of the court was drawn only to the general rule, without its qualification. That decision is the chief cause of the present note. It is believed that if the counsel for the plaintiff in error had pursued his researches a little further, and laid the authorities before the court, the result of that case would have been different.

But warranty, in its original form, has long been abolished both here and in England. The more plain and pliable form of covenant has been substituted. The grantor for himself, his heirs, &c., covenants with the grantee, his heirs and assigns, that he and his heirs, executors and administrators, will warrant and defend the premises conveyed, against himself, his heirs, &c. either generally or specially, as the parties agree. This is *prima facie* a covenant to do what in the old form was expressly done, and it might admit of a curious construction. If, by the warranty in its original nature, the warrantor was obliged to render land only, the covenantor might perhaps be entitled to tender land as a compliance with his covenant, and might also avail himself of all the niceties and subtleties which characterized the ancient doctrine.

It is true that in some cases damages were also recoverable by the warrantee. If a man be impleaded in assize, &c. and he brings a writ of *warrantia chartæ*, if the plaintiff recover his warranty he shall recover his damages, and also to have the value of the land lost. Fitz. Nat. Brev. 315.

But it would seem that the same rule did not take place, if the warrantor was vouched, and not sued by *warrantia chartæ*. Br. Warr. Chart 31.

In Duval v. Craig, 2 Wheaton, 45, there was in the same deed a covenant that the land was free of incumbrances, and also an express warranty (not a covenant to warrant) that if the land, or any part of it, shall at any time be taken by a prior legal claim, the grantors and their heirs shall make good to the grantee and his heirs, the part lost by supplying other lands in fee of equal quantity, and quality, but the court held that the latter did not apply to the first covenant, and therefore the effect of the warranty was not decided. It may be presumed, that if the court had held this clause of the deed to be before them, they would have deemed it necessary either that a proper writ of *warrantia chartæ* should have been issued, after the eviction, or if it was competent to the grantee to proceed by an action of covenant, that notice should have been given, and a demand of other lands made.

We have no reason to believe, that, in this state, a covenantor ever attempted to discharge himself of the covenant to warrant and defend by pleading that he was always ready to convey lands of equal value or by showing that he had no notice of the eviction, and no demand of other land &c. On the contrary the covenant, like all other covenants, has always been held to sound in damages merely, which after judgment, may be recovered out of the personal or real estate as in other cases. If indeed the covenant admitted of such a construction, little advantage would be gained by it. In the case of Williamson v. Codrington, 1 Vez. 510, which was a voluntary settlement on illegitimate children of real and personal estate, with a covenant to warrant and defend, Lord Hardwicke held that the word warrant must be "construed in a larger sense than warranty in its strict legal sense; as large as defend." There being personal property included in the covenant was adverted to by his lordship, but in reference to the real estate the distinction was also taken. And the course of the reasoning may, we think, be considered as now settled, that although the word warrant be introduced, yet the emphatical part of the covenant is to defend. See King's Commentaries on American Law, vol. 4, p.

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feited. An immediate right *of entry accrued on the forfeiture. 1 Cruise on Real Property, 93, 94; Abbott [*69] v. Jenkins, 10 Serg. & Rawle, 296. Supposing the youngest of the plaintiffs to have been just born, when the recovery was suffered, her infancy ceased in 1791. Since that period no suit has been brought, except one which was discontinued. It is true, they married during infancy, and their coverture has only ceased within a few years, but this is no answer to the act of limitations, because one disability cannot be fastened upon another, so as to save their rights beyond the time prescribed by the statute. Thompson v. Smith, 7 Serg. & Rawle, 209.

5. Since Charles Knight sold the property in dispute to Andrew Keyser, from whom the defendant below derived title, valuable improvements have been made with the knowledge of the plaintiffs below, who after the lapse of fifty years, not only claim the land, for which their father has received full value, but the improvements also. This is forbidden by one of the plainest and most familiar principles of equity, that a man shall not be permitted to stand by and see another make improvements on land claimed by him, without giving notice of his claim, and afterwards assert that claim to the injury of the other. Sudg. on Vend. 522; 1 Madd. Ch. 209, 210; East India Company v. Vincent, 2 Atk. 82. The plaintiffs below gave no notice of their claim, except by a suit about the year 1793, which they afterwards abandoned. This makes the equity against them stronger, as it gave the defendant below reason to believe that whatever claim *they may have supposed themselves to possess was relinquished, and thus he was encouraged to make further [*70] improvements. It would be against equity to permit the plaintiffs below to recover at all, and still more so, to permit them to recover without previously tendering the value of the improvements with interest.

457, in which the "learned opinion" of Judge Duncan, 11 Serg. & Rawle, 109, is cited with the praise it deserves.

The result on the whole seems to be, that a covenant to warrant and defend, is to be construed a covenant running with the land, to defend the covenantee his heirs and assigns; and that it precludes the grantor and all his heirs and assigns (not merely the heir at common law) from claiming it, and binds all his estate, real and personal, in case of eviction by a stranger, to the amount of the damages sustained. The measure of those damages may be considered in some degree fixed with us, by the decision in Pender v. Fromberger, 4 Dall 442, viz., that the amount of the purchase-money can alone be recovered. In a very able note to the case of Duval v. Craig, a view is taken of the rule that prevails in different states on this subject. Whether interest shall be recovered without an allowance for the use and profits of the land during the time it was enjoyed by the grantee must depend upon the circumstances. A jury would be competent to decide on those circumstances.

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Chew for the defendants in error, contended,

1st. That vested rights in remainder cannot be affected by a recovery suffered by tenant for life. Stat. 14 Eliz. ch. 8; *Lyle v. Richards*, 9 Serg. & Rawle, 53; *Dunwoodie v. Reed*, 3 Serg. & Rawle, 453.

Charles Knight took merely an estate for life. An estate given for life expressly is never enlarged by implication. *Ginger v. White*, Willes, Rep. 348; *Dunwoodie v. Reed*, 3 Serg. & Rawle, 438, 439; *Findlay v. Riddle*, 3 Binn. 148. Since *Archer's Case*, 2 Co. R. 66, the word "heir," with words of inheritance superadded, has always been held to give the devisee an estate by purchase. *Fearne*, 152; and the word "issue," yields to the rule in *Shelly's Case*, with more difficulty than the word "heir," *Preston on Estates*, 294; *Lord Glenorchy v. Bosville*, Cas. Temp. Talb. 3; *Fearne*, 117. Wherever words of limitation are superadded, the word "issue," is construed to be *designatio personæ*. *Luddington v. Kime*, 1 Ld. Ray. 205; *Preston on Estates*, 278, 280; *Fearne*, 150, 153. In *Findlay v. Riddle*, from 149 to 153, Judge Yeates enumerates the cases in which the words "heirs," and "issue," are taken as words of purchase. The use of the word "issue," in the will of John Knight, as *nomen collectivum*, repels the presumption that the testator meant it as a word of inheritance. The word "then," in the devise of the estate, "then to the issue and their heirs," in an adverb of time denoting the time when the issue or children of Charles were to take, and the word "heirs," in the plural number shows, a new inheritance was to commence in them. The reasons given in the English books, why the word "issue," or "heirs," in the plural number, shall be construed as words of limitation, do not apply in Pennsylvania, where all the children take together, and constitute one heir. Wherever the words engrafted on the word "issue," would take the estate into a different course of succession from words giving the inheritance to the first taker, the issue take the estate as purchasers. *Fearne*, 183. Thus, if an estate tail be first given, as to the issue male of the first taker, and words be engrafted upon this devise serving to limit the fee, the first taker will have an estate in tail male; but if the words be not such as must necessarily be construed an estate tail in order to effectuate the general intent of the testator, but the devise be to the issue of the first taker in fee, no case can be found in which the issue have been held to take by limitation, and not by purchase. It is competent to the testator, if he pleases, to make the heir of the tenant for life, a new stock, from which the inheritance shall in future descend. Co. Litt. 379, note A. The only question is as to his intention. The intention of John Knight clearly was to preserve the estate

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in the *issue of his son Charles, free from the control of their father, to whom he gave an express estate for life [*71] only. That such was his intention cannot be questioned. Half the rent is given to his wife, after the death of Charles, that is, as soon as the new stock comes into possession. *Hodgson v. Ambrose*, Doug. 337; *Preston on Estates*, 273, 275; *Doe v. Provoost*, 4 John. 63. The English cases from *Goodright v. Pullyn*, 2 Ld. Ray. 1357, to *Denn. v. Puckey*, 5 D. & E. 299, and the cases cited from our own reports, go no further than to decide, that where the first limitation would amount to an estate tail special, or an estate tail male or female, the superadded words of inheritance limiting the fee will be disregarded; but where the devise is expressly for life, and if issue be left, then generally to the issue with words of inheritance engrafted upon the devise to the issue, the rule of construction as traced down from *Archer's Case*, that the first taker shall have only an estate for life, has never been overruled. *Morris v. Le Gay*, cited in 10 Serg. & Rawle, 432, was a devise to A. for life, and then to the heirs of the body of A. and their heirs. The word "heirs," in the plural number, was used throughout, and the general intent clearly was to give an estate tail to A. *Dodson v. Grew* was a devise to A. for life, and then to his issue male, and the heirs male of such issue male, and the general intent of the testator could not have been effectuated, except by giving an estate in tail male to the first taker. In *Robinson v. Robinson*, 1 Burr. 38, no words of inheritance were superadded to the limitation to the issue. *Wright v. Pearson*, and *King v. Burchell*, were both cases of estates in tail male, and the words, "share and share alike," used in the last case, received an opposite construction in *Abbott v. Jenkins*, 10 Serg. & Rawle, 298, 299, where the argument is relied on that the legal representatives of the issue are to take. *Carter v. M'Michael*, 10 Serg. & Rawle, 432, was also a case of remainder to heirs male. In no case cited by the counsel of the plaintiff in error, was the devise to the issue generally, with words of inheritance superadded generally, as in the present devise. In *Irwin v. Dunwoodie*, 17 Serg. & Rawle, 61, and in *Caskey v. Brewer*, Ib. 441, there were no words of inheritance superadded to the word "issue." The rule in *Shelly's Case* is derived from the dark ages; its reason has long since ceased, and it is not to be extended beyond actual precedents.

2. The children of Charles Knight, took vested and not contingent remainders in fee, which were not affected by the recovery suffered by their father. The remainders vested in the children who were born at the time of the recovery, opened from time to time to let in the children who were afterwards

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born. 2 Cruise Dig. 234, 235, secs. 15, 16, 17; Doe v. Provoost, 4 John. Rep. 61; Abbott v. Jenkins, 10 Serg. & Rawle, 299.

3. The plaintiffs below were not barred by the warranty of Charles Knight. They do not claim title by descent from him, but under the will of their grandfather John Knight. His warranty therefore was collateral, Co. Lit. tit. Warranty, sec. 705.

[*72] And it is by no means certain, that collateral warranty will bar in Pennsylvania. Warranty will not bar unless the estate be divested and turned to a right, at the time the warranty is made. Viner, tit. Voucher, H. 9 Rep. 106; Edward Symond's Case, 10 Rep. 96, b. Charles Knight, having forfeited his estate for life by suffering a recovery, could not afterwards divest the rights of those in remainder; and having no estate, he could then only make a warranty by disseisin, which creates no bar. Charles Knight's deed with warranty, was a bargain and sale; and bargainee shall not vouch to warranty. Gilb. Law of Uses, 102, 103; Viner, tit. Voucher, sec. 11; Smith v. Pierce, Carth. 101; 1 Saund. 260; 1 Rep. 98; 4 Lev. 124. At all events, the plaintiffs below are not bound by the warranty. Warranty descends upon the heir at common law. Litt. sec. 718; Jourdan v. Jourdan, 9 Serg. & Rawle, 268. *Non constat*, that John, the son of Charles Knight died without issue. He was the heir at common law, and the heir upon whom the warranty has descended, if upon any one, is to be sought for in his line. Eshelman v. Hoke, 2 Yeates, 509, was a case of warranty by tenant by the curtesy, and within the statute of Gloucester. Another reason why the plaintiffs below are not affected by the warrantee is, that they were not of full age. It is a settled rule, that warranty will not bar unless the party sought to be affected by it is of full age when the warranty falls. Shep. Touch. 178.

4. The entry of the plaintiffs below is not barred by the act of limitations. It runs only from the time the right of entry accrued, which was at the death of Charles Knight, the tenant for life. Wells v. Prince, 9 Mass. R. 508; Bigelow's Dig. tit. Devise. They could not enter for the forfeiture produced by the recovery, because they were not the heirs at common law. Jourdan v. Jourdan, 9 Serg. & Rawle, 268.

When Mr. Chew was about to commence his argument in relation to the improvements made by the plaintiff in error, the court told him it was unnecessary for him to speak to that point, as there was nothing in the case to show concealment of title, or acquiescence by the defendants in error in the erection of the improvements.

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The opinion of the court was delivered by

KENNEDY, J.—This case has grown out of the will of John Knight, dated the fifth day of January, 1761. That part of the will out of which the question to be decided arises, is in the following words: "I give to my son Charles Knight my messuage and plantation situate in Abington, in the county of Philadelphia, the which I had from my father, with the buildings and appertinances thereunto belonging, with the rents issues to him during his natural life; and if he shall leave lawful issue, then to them, their heirs and assigns forever. But for want of such lawful issue, then it shall return to my son John Knight; and if he should leave no lawful issue after his decease, then to my next lawful heir, and to their heirs and assigns forever."

*At the date of the will the testator had another child, a daughter, named Rachel. Charles, the son, at this [*73] time, had no issue; nor had he any subsequently until after the death of the testator. The decision of the contest here depends upon the solution of the question, What estate did Charles take under the above devise?

The case of *Carter v. M'Michael*, in 10 Serg. & Rawle, 429, is not unlike the present. The application of the principles laid down by this court in that case, will go far towards deciding the question in this. The testator in that case gave to his son Edward two tracts of land, to hold to him and his assigns, for and during the term of his natural life, he making no waste or destruction of the timber thereupon, and paying thereout to the testator's daughter Agnes the sum of twenty pounds in gold or silver money, within the space of two years after his wife's decease; and from and immediately after the decease of his son Edward, he devised one of the said tracts to his sons Joseph and Daniel, their heirs and assigns, forever, as tenants in common; and the other to the heirs male of the body of his said son Edward, lawfully to be begotten, and the heirs and assigns of such heirs or heir male, forever; and for want of such heirs male, then to his said two sons Joseph and Daniel, their heirs and assigns forever, as tenants in common. The opinion of the court in this case was delivered by the late Chief Justice Tilghman, deciding that Edward, the devisee, thereby took an estate tail. Yet it is manifest from the words of the will, that the testator did not intend that he should have more than an estate for life; for he not only declares most expressly, that it shall be for and during the term of his natural life, but further prohibits him from committing waste or destruction of the timber thereupon; thus depriving him of all privileges other than those of a mere tenant for life. But in order to carry into effect the general intent of the testator, the court felt itself bound to disregard and over-

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rule this particular design of the testator as respected Edward personally.

In the case now to be decided, the testator has employed no terms, which would seem to indicate a desire on his part to deprive Charles, the devisee, of the common and ordinary privileges of a tenant in fee tail. It is given to him with the buildings and appurtenances thereunto belonging, with all the rents and issues thereof, to be used without any express restrictions whatsoever. The words "during his natural life," it is true, are superadded, but it will be seen that these words have no effect, where they are opposed to the general intent of the testator, as in the case already cited. In that case the general intent of the testator was, that the male issue of Edward should take, to the exclusion of all others, and that the estate should not go over so long as there were any of such issue in being. This intent, however, was incompatible with a mere life estate in Edward, and consistently with the rules of law, could not be effectuated without giving to him an estate tail male under the will, which was accordingly done by the decision of the court. So in the case before the court, it is manifest, that the general

[*74] intent of John Knight, the testator, *was, that immediately upon the decease of his son Charles, the estate devised to him, should go to the heirs generally of the body of Charles, and not to John, or any other, until after an indefinite failure of the issue of Charles. But upon such failure, whensoever it might happen, it is also equally manifest, that the testator intended, that it should pass to his son John, or his issue; and in the event of his, and his issue, both being or becoming extinct, it was to go over. Now to hold that Charles, took but a life estate, as contended for by the counsel for the defendant in error, and that his children have a remainder in fee, must necessarily defeat the remainder over to John and his issue; because it is not only too remote to take effect consistently with the rules of law, but in short it leaves no remainder for them. The fee simple was all the testator had to give, and if that be now absolutely vested in the children of Charles, it is all and the most the testator ever had. But can this be permitted in accordance with the intention of the testator? Not well, indeed, unless we suppose, that the testator had a greater regard for the issue of Charles, who were not yet in being, and of whom, of course, he could know nothing, than he possessed for Charles himself, who was his first son, who had shared his most anxious cares as well as parental caresses for many years, and was about to be made the first object of his bounty; it seems incredible to say the least of it. Besides, to say that the testator intended to give Charles merely an estate for life with a remainder over in fee to his

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children living at his death, or as they came into life, would be declaring that he had less regard for Charles, than he appears to have had for his son John, which is contrary to the whole tenor of the will. There is no reason for believing that the testator ever intended to give to Charles a less estate in the devise of this property to him, than he has limited over in remainder to his next son John upon the failure of issue on the part of Charles. That the estate given over in remainder to John, is not a life estate, but an estate tail general by implication, it is believed, cannot, and will not be denied; and so far as personal feeling and attachment could have had an influence upon the testator, there is no reason to believe that he intended less for Charles. But admitting that there was some reason existing with the testator for his giving to John a greater estate, than he gave to Charles, is it not then reasonable, that he should also have felt the more anxious to make John as secure as possible in the enjoyment of it, upon the happening of the event, on which it was to go over to him? So that viewed in either light, we would be led to say that Charles took an estate tail. Against this it has been contended, that by the very terms of the devise itself, an estate for life only is given to Charles. To this an answer has already been given; which is, that in the construction of wills, to effect the general and main intent of the testator, where he has in limiting the duration of an estate devised, used the words "for his life," "during his life," or "during his life and no longer," they are set aside and disregarded. In addition to the case already quoted, the cases of **Morris v. Le Gay*, [**75*] 2 Burr. 1102; Atk. 249; *Coulson v. Coulson*, 2 Stra. 1125; 2 Atk. 246; *King v. Burchell*, Amb 379; 4 Term. Rep. 296, (note); 3 Term. Rep. 145, (note *a*); *Dodson v. Grew*, 2 Wils. 322, are referred to.

In the next place it is urged, that by the will, in the terms used for the devise in question, the property is given upon Charles' death, to his "issue," and that the word "issue," is a word of purchase, and not of limitation. In legal construction it is certainly so considered, and never otherwise in the case of deeds. But in wills it may be taken either as a word of purchase, or of limitation, as will best answer and promote the intention of the testator. *Hoge v. Hoge*, 1 Serg. & Rawle, 155. Per Yeates, J. See also the cases referred to above.

Again, it is said, that the words of inheritance, which are engrafted on the limitation to the issue of Charles, take this case out of the rule in *Shelly's Case*; and the cases of *Cheek v. Day*, Moor, 593; *Archer's Case*, 1 Rep. 66, and *White v. Collins*, Comyn Rep. 28, are relied on. In these cases, it is true, that the first taker of the estate was held to have only an estate for

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life, because the limitation over, after giving to A. as in Archer's Case, for life, was to the next heir male of A. (in the singular number), and to the heirs male of the body of such next heir male. The words "heir male," being in the singular number, and words of inheritance superadded, became *designatio personæ*, the root of a new inheritance,—the stock of a new descent. Luddington v. Kime, 1 Salk. 224; 1d. Raym. 203, is also cited and relied on. There the devise was to B. for life without impeachment of waste, and in case he should have any issue male, then to such issue male, and his heirs forever. Here, again, the words of inheritance are engrafted upon the word "issue," in the singular number, as is demonstrated by the use of the pronoun "his," referring to "issue." Further it appears to have been the intention of the testator to make B. a tenant for life, otherwise it would have been unnecessary to have introduced words to protect him from the consequences of committing waste. Again, the limitation is to the issue male, and not to the issue generally of B., which would have been sufficient, it is conceived, to have constituted B. a tenant in tail. This last distinction is also a sufficient answer to the case of Beckhouse v. Wells, which has also been referred to by the counsel of the defendants in error.

The general rule laid down upon this point, as extracted from the cases by Mr. Fearne, in his treatise on Contingent Remainders, 181, is, if the words be "heirs" or "heirs of the body, &c.," and "issue of the body" may be added to supply what is intended here by the "&c." in the plural; in that case even words of limitation engrafted on them, if not inconsistent with the nature of the descent, pointed out by the first words, will not convert them into words of purchase. In the case of Dodson v. Grew, already mentioned, 2 Wils. 322, the word "issue" was the term employed by the testator. He devised "to A. [*76] *for life, remainder to the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male, and for want of such issue male, over," and held that A. took an estate tail.

In another case which has not been referred to, the devise was "to A. for life, and after his decease to the issue of his body, and the heirs of such issue forever; and for want of such issue to B." The court seemed to think that A. took an estate tail. Webb v. Puckey, cited in the 3d American Edit. of 8th Lond. Edit. of Fearne on Cont. Rem. 203, (note.) It would be difficult to point to any substantial difference between this last case and the one before the court.

The court being unanimously of opinion, that Charles took an estate tail under the devise of the premises in question to

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him, and that the defendants in error are barred by the common recovery suffered by him, consider it, therefore, unnecessary to give any opinion upon the other questions raised in this case.

The judgment of the court below is reversed, and judgment entered upon the special verdict for the plaintiff in error, who is the defendant below.

Cited by Counsel, 7 W. & S. 294; 8 W. & S. 39; 4 Barr. 104; 4 H. 379; 11 H. 239; 12 H. 245; 6 C. 172; 7 C. 95; 9 C. 93; 2 G. 347; 1 Wr. 33; 8 Wr. 301; 10 Wr. 398; 13 Wr. 51, 339; 14 Wr. 131; 1 G. 211; 13 S. 483; 14 S. 13; 17 S. 122; 20 S. 506; 31 S. 361; 5 N. 245; 6 N. 146; s. c. 6 W. N. C. 38; 4 W. N. C. 440.

Approved and followed in, 4 H. 105; 20 S. 73.

Cited by the Court, 1 H. 354; 4 C. 108.

[PHILADELPHIA, JANUARY 17, 1831.]

Nitzell *against* Paschall.

APPEAL.

Testator, being the owner, in whole or in part, of four contiguous tracts of land, which were in part bounded by a water course, devised one of them, situate on the west side of the water course, to his son B. under whom the plaintiff derived title. To his son H. the defendant, he devised his "undivided moiety of a certain four acres, called the 'saw-mill land,' together with all the rights and privileges thereunto appertaining." This undivided moiety of the four-acre tract had come to the testator with a privilege appertaining to it, of swelling the water back to the southern boundary of the land devised to his son B. By the same will, the testator gave to his son H., the defendant, the privilege of erecting a dam, at any point between the land devised to his son B., (the plaintiff's land,) and the land on the eastern side of the creek, devised to another son I., with a right to dig a race through I.'s land. The defendant erected a dam across the creek within the limits mentioned in the last devise; and afterwards erected another dam, at a considerable distance below, for the use of "the saw-mill land," where there had many years before been a dam erected, but the use of which had been abandoned, at least thirty-eight years.

Held, that the whole of the property in the water course under the testator's control, passed by these devises to the defendant: that having been used by him in part, by the erection of the first dam, no presumption could arise from lapse of time, of any release or extinguishment of his right to any other part of it, and that consequently he had a right to erect the second dam.

APPEAL from the Circuit Court of *Delaware* county, in an action on the case, brought by Jacob Nitzell against Henry Paschall, to recover *damages for an alleged injury done [*77] by the defendant, by erecting a dam across Cobb's Creek, and thereby causing the water to overflow the plaintiff's land, situate on the west side of the creek.

The cause was tried before GIBSON, C. J., in August, 1830.

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when a verdict was given for the plaintiff for thirty dollars damages. The defendant moved for a new trial, and the motion being overruled, and judgment rendered on the verdict, he entered an appeal to this court.

The plaintiff derived his title to the premises under a deed from Benjamin Paschall, who held them under the will of his father, John Paschall, dated the 16th November, 1774. John Paschall derived his title under a conveyance from William Garrett and James M'Clees, executors of Everard Ellis.

The defendant claimed a right to erect and maintain his dam, under the following devise in the will of the said John Paschall :—

“I likewise give and devise to my said son Henry Paschall, his heirs and assigns forever, the free right, liberty and privilege, to construct and make a dam across Cobb's Creek, at such place as shall appear best for that purpose, between my land, that was late Everard Ellis', and my land I lately bought of Swan Rambo, or any other land on the easterly side of the creek, that may be hereafter purchased,” &c.

“I also give and devise to my said son Henry, all that my moiety, or undivided half part of, and in, certain four acres of land called ‘the saw-mill land,’ lying by the side of Cobb's Creek aforesaid, held in partnership with Isaac and Hugh Lloyd, together with all my rights and privileges thereunto appertaining, to hold to him, my said son Henry Paschall, his heirs and assigns, forever.”

The devise to the testator's son Benjamin Paschall, of the land on the west side of the creek, was expressly subject to the rights and privileges given to the defendant.

About the year 1800, the defendant built a dam across Cobb's Creek, at a considerable distance above the one which was the subject of the present complaint, and within the limits mentioned in the first devise. The upper dam was, at the time of the trial, owned by Levis Passmore, and it was contended on the part of the plaintiff, that in erecting that dam, the defendant had fully satisfied the devises in his father's will.

For the purpose of showing that a right to erect a dam was appurtenant to the four acre tract called “the saw-mill land,” the defendant gave in evidence the following chain of title, viz. : A patent for one hundred acres of land, including the site of his dam and mill, dated the eighteenth of the sixth month, 1689, to Peter Cock, and twenty-three others, as tenants in common.

This patent, recites that the said hundred acres of land were granted by virtue of a warrant from the proprietor and governor, bearing date the thirty-first of the fifth month, 1684, and laid out by the Surveyor General's order, the seventh of the

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sixth month, 1684, unto the *said Peter Cock, and others, old renters, which hundred acres of land was granted by [*78] the said proprietor and governor to the said persons, their heirs and assigns forever, for the use, benefit, privilege and accommodation of the mill within the same included, and for no other use whatsoever; and grants and confirms the said hundred acres to the said patentees, their heirs and assigns, (but for the only use, benefit, privilege and accommodation of the said mill:) to be holden of the said proprietor, &c., as of his manor of Springettsbury, &c., "they fencing and building thereupon according to regulation."

In the years 1699 and 1700, the shares of twenty of the patentees became vested, by various conveyances, in John Bethell, the elder. The conveyances to Bethell, all mention the mill, as then existing, and in seven of the deeds it is called "an old mill."

In the will of John Bethell, dated February 20, 1707-8, the property is spoken of as "the hundred acres he bought of the Swedes, being then in his possession."

After John Bethell's death, his twenty shares, with the possession, became vested in his son John Bethell, the younger, who, in 1714, purchased another share.

John Bethell, the younger, by his will, dated April 13th, 1725, devised the hundred acres, calling it "the mill creek land," to his wife and executrix, Rose Bethell, with power to sell.

In 1727, Rose Bethell conveyed to Read and others, seventy-six acres on the Philadelphia county side of Cobb's Creek, being part of the hundred acres, with the right to join a dam or dams to other land of the said Rose Bethell, on the west side of the creek.

In 1730, Read and others conveyed to Obadiah Johnsons, the land and privileges granted to them by Rose Bethell.

In 1742, Obadiah Johnsons, by deed, reciting that he had "allotted and appropriated four acres" of the land conveyed to him by Read and others, "for the use and benefit of a saw-mill," and that he had granted one moiety of the said four acres to Joseph Bonsall, and that he and Bonsall had erected thereon a dam and saw-mill; grants the other moiety of the said four acres, with the saw-mill and privileges appurtenant to the above named John Paschall.

In 1747, John Paschall purchased from the heirs of the patentees the three outstanding shares of the hundred acres.

John Paschall, by his will, dated November 16th, 1774, devised to his son Henry, the defendant, "all that, his moiety or undivided half part, of and in certain four acres of land, called

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‘the saw-mill land,’ lying by the side of Cobb’s Creek, together with all his rights and privileges thereunto appertaining.”

The moiety of the four acres held by Joseph Bonsall, became vested, by a series of conveyances, in Hugh Lloyd, who conveyed the same, in the year 1800, to the defendant.

The defendant is also entitled, under the residuary clause of John Paschall’s will, to the three shares of the patent purchased by him in 1747.

[*79] *It was testified by the witnesses of both parties, that they had seen the remains of an old dam, where the present dam is built. A log with some of the braces pinned on it, and a part of the embankment on the west side, were to be seen, before the defendant built the dam, which was washed away in 1819. It was also in evidence, that there were no traces of any dam ever having existed below the site of the present dam, which was the lowest on the creek, and but twenty or thirty feet above the head of tide water.

It was further in evidence, that the natural fall of the creek, between the site of the dam, and the place where the upper line of the patent crosses the creek, was very small, not more than from one to two feet; and also, that the power which the present dam gave the defendant, was not more than was necessary for the small saw-mill he had erected. The witness called the power, “a very weak one.”

GIBSON, Chief Justice, charged the jury as follows :

It is clearly proved, that the defendant has raised the water in the plaintiff’s watercourse, and flooded a portion of his land, and the latter will therefore be entitled to damages, unless the defendant can show, that he has a license to do so from some one authorized to grant it. The defendant claims this license under his father’s will. The father owned all the land on the diagram, that is to say, the old patent of one hundred acres, Pannell’s land, Nitzell’s land, and Rambo’s land, and had a right, if he thought proper, to give any one a right to flood either of these tracts. The question is, did he give the defendant a right to flood Nitzell’s land? It is certain he has not done so, expressly as regards the dam in question. He gave the defendant a right to do so by a dam higher up the creek, and that dam has been erected and parted with to a purchaser. The defendant claims by another device, in which he gives his half of the four acre mill tract to the defendant, “together with all his rights and privileges hereunto appertaining.” Was there then any right attached to these four acres in the hands of the testator’s father, independent of his general power as owner of both tracts, (for that is all which he has devised,) to author-

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ize the owner of the four acres to flood Nitzell's land? For it is certain that he gave it with no greater privileges than were attached to it when he got it.

There can be but one origin for this right; and that is, if there be any such right, the patent for one hundred acres, of which the four acre mill tract was originally a part. In the patent, there is a clause which declares the grant to be for the use of a mill then erected and in operation. It is said, that this mill could not have been effective for any useful purpose, without occupying all the water-power used at this day; consequently, that the right of the patentees to do so was ratified by William Penn, the owner of all the lands above. Was he then the owner of the lands above? There is no proof of it; but, perhaps, it ought to be taken to be so, the proof resting on the plaintiff.

*But whatever the rights of the owners of the original mill may have been, they have clearly been lost by lapse [*80] of time. The mill was in operation in 1689, since when we have no account of it, except that a saw-mill is mentioned in Obadiah Johnson's deed, in 1742. The deposition of Judge Lloyd, now ninety years of age, may be supposed to go back eighty years, as he speaks of knowing the place in his boyhood, and he says nothing of the mill being in operation then. It is probable that it did not last many years after its erection; the first attempt at improvements of this sort being very imperfect, and generally superseded by better and more perfect erections. Then for more than seventy years, it is pretty clear, that this dam was abandoned. And if so, the right was lost in 1825, when the present dam was erected.

There is a particular reason why this privilege should be forfeited by *non user*. The consideration for the grant of the privilege was the benefit to the public from the erection of the mill. But, if this benefit ceases for eighty or one hundred years, so should the privilege also, and if it ceases for a moment, it is gone forever; I should say, that if the dam was down for forty years, the privilege would be gone. Indeed, if the consideration for the grant of this privilege were the benefit to be derived from the mill by the public, the privilege would be abandoned as soon as the operations of the mill were permanently abandoned.

There is but one other privilege to which the testator could have alluded. John Bethell the younger, owned the one hundred acre patent, and devised it to his wife Rose, under whom the testator derived title. Rose had sold a part of the one hundred acres with power to flood the rest. She had no power, however, to authorize her grantee to flood land not her own;

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consequently, a devise of part of the land derived from her with the rights appurtenant to it, when it came into the devisor's hands, can give no greater right than was in the grantor from whom he acquired it.

From no other part of the will can I discover anything like a privilege to flood the plaintiff's land. The devise of the residue does not carry it, for such a right is no part of the residue.

You are to give the actual damages—these are exceedingly small, according to the evidence of all the witnesses. Two hundred dollars, it is said, would pay all damages past, present or to come—you can compensate none but what have already been suffered, and these appear to be little more than nominal.

The defendant's counsel filed the following reasons, in support of their motion for a new trial, in the Circuit Court :

First. That the court erred in charging the jury ; that where no mention has been made of the existence of the saw-mill for more than fifty years, the law presumed an abandonment of a previous vested right to erect such mill, and a dam to supply the same ; and that such presumption was so strong, that the [*81] law drew the conclusion, *let the fact be as it may, and the jury were bound to find accordingly.

Second. That under the patent given in evidence in this case, dated the 18th of the 6th month, 1689, there was failure of the consideration of the grant, so soon as the mill went down ; and that thereby the grantees in the said patent, and those claiming under them, gave up their privilege, and forfeited all rights derived under the same.

Third. That under the will of John Paschall, and the devises therein to his son Henry, there was no right given, either directly or indirectly, to him, to use the privilege attached to the four acres of "the saw-mill land," for erecting or maintaining a dam, and flooding back the water.

Wm. T. Smith and *Tilghman* for the appellant cited *Angell on Adverse Enjoyment*, 23, 76, 89 ; 6 *Com. Dig.* 79, *Presumption*, E. 2 ; *Act of 26th March, 1785*, *Purd. Dig.* 532 ; *White v. Crawford*, 10 *Mass. Rep.* 181 ; *Butz v. Ihrie*, 1 *Rawle*, 218 ; *Richard v. Williams*, 7 *Wheat.* 59 ; 3 *Starkie on Evid.* 1235 ; 1 *Proud's Hist. of Penn.* 110, 116, 123, (note ;) *Blaine v. Chambers*, 1 *Serg. & Rawle*, 169 ; 2 *Bl. Com.* 155 ; *Lithell's Case*, 4 *Co. Rep.* 86.

Dick and *S. Edwards*, for the appellee, cited *Cluggage v. Duncan*, 1 *Serg. & Rawle*, 120 ; *Angell on Adv. Enjoyment*, 92, 109, 110.

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The opinion of the court was delivered by

GIBSON, C. J.—The foundation of the licence mainly relied on at the trial, was a supposed grant in the patent of 1689. The patent was issued to twenty-four grantees “for the use of a mill;” and hence, as the land granted did not afford a sufficient water power for the purposes of the mill, which it appears was even then erected, it is supposed that this designation of the object in view, amounted by necessary implication to a grant of any additional power that was at the disposal of the proprietary. It might admit of a question, whether a grant by one, who acted in the capacity of a sovereign, could be extended by implication, without proof of knowledge, that such extension would be absolutely necessary to carry the main design into effect. Again, it seems the patent was not issued as evidence of an original grant, but to confirm the grantees in possessions guaranteed to them in the act of cession by which the Swedish colony passed to the British crown. If so, the grantees held by title paramount; and if the lands of the plaintiff were held by the same species of title, as is altogether probable from the circumstance that it lay in the heart of the Swedish settlement, and contiguous to what was called the governor’s palace on Tinicum Island, it could not be affected by any grant or reservation of the proprietary, as either would be in derogation of the treaty. The inclination of my mind, however, happened to be in favour of supporting the implication of a grant strengthened, as it seemed to be, by a long, and at one time an uninterrupted possession and use of the right. But evidence having been given of a *subsequent *non user* for at least thirty-eight years, [*82] I directed the jury, that in the absence of proof to the contrary, the law raised a presumption, which they were bound to adopt, let their actual belief be what it might, that the right had been released or extinguished in some other lawful mode: and of the solidity of this also, without intending to intimate an opinion either way, I am inclined to doubt. It is certainly true that a right of enjoyment may be lost in the same way it has been gained, and when acquired by an adverse possession for twenty years, it may, I should suppose, be lost by *non user* for the same period. Where, however, it has been acquired by grant, it will not be lost by *non user* in analogy to the statute of limitations, unless there were a denial of the title or other act on the adverse part to quicken the owner in the assertion of his right: and this much was decided in *Butz v. Ihrie*, (1 Rawle, 218.) I think there cannot be a doubt, but that lapse of time may be so great as to afford a natural presumption without aid borrowed by analogy from the statute of limitations. The question was, however, whether mere *non user* for any length of

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time without any disaffirmance of the right on the adverse part, were sufficient to found an artificial presumption, or could operate in any other way than as evidence to be left to the jury for what it might seem to them to be actually worth. Happily, the decision of this question is superseded by a new state of the case produced by the effect of the will to which, at the trial, I did not sufficiently advert. The testator was at the time of his death, the owner in whole or in part of four contiguous tracts of land, which are in part bounded by the water course in question. Of these, one is now owned by the plaintiff, and another by the defendant. To the latter was devised the testator's undivided moiety of certain four acres called "the saw-mill land," "together with all the rights and privileges thereunto appertaining." Now independently of the testator's power to burthen, at pleasure, particular parts of his estate with easements or privileges in favour of devisees of the other parts, it is to be remarked, that this undivided moiety of the four acres had come to him with a privilege appertaining to it, and created either by an implied grant in the patent, or at least by long adverse possession, of swelling the water back certainly to the mouth of what is called Middle Run; and this is a privilege appurtenant, expressly devised to the defendant. I am aware that there was another privilege appurtenant of butting a dam on the opposite shore, which might be sufficient to satisfy the words of the devise; but the construction we have adopted seems to be in furtherance of the plain and obvious general intent of the will, in favour of which particular expressions ought to be liberally expounded. The devise of the appurtenances to the saw-mill tract, then, is an express devise of a right to swell the water as high as the mouth of Middle Run, which is the lowest and southernmost boundary of the plaintiff's land. But in addition, the testator devises to the defendant a right to erect a dam at any point between the plaintiff's land, then devised to the testator's son

[*83] *Benjamin, and the land on the eastern side of the creek, devised to his son John; with the further right to dig a race through John's land. Is not this substantially a devise of the remaining part of the water power; and does it not, in conjunction with the devise of the privileges appurtenant to the saw-mill tract, which were never severed from it by the testator, pass all the property in the water course, which was subject to his control? Although the words, taken strictly, import nothing more than a right to erect a dam, the subject of the devise is the water power: the authority to erect a dam on the land not belonging to the devisee, having regard only to the mode of enjoyment, which could not have been in this way, unless the privilege could not have been exercised by means of a dam erected on the

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devisee's own land. In *Butz v. Ihrie*, already cited, where there was a reservation in a conveyance of a right to swell the water by means of "a dam," it was held that the substance of the reservation was the right to overflow; and whether this were done by one dam or more, was unessential, so that the mode of enjoyment being merely directory, could not abridge the extent of the right. Now it is impossible not to perceive that the leading intention of the testator here was to attach to the saw-mill tract all the power which the water course afforded, and this with the most extended means of enjoyment, which it was in his power to confer, inasmuch as the power being barely sufficient for a mill at the lowest point of the water course within his boundary, would have been altogether worthless, had it been distributed among the different parts of his estate. The intention then being clear, and the words being sufficient to pass the right, it results that a licence sufficient for all the purpose of defence was created by the will; against which, having been partly put in use by the erection of what is now Passmore's dam, there can be no presumption from lapse of time, of any release or extinguishment whatever; and I ought to have so instructed the jury.

Judgment reversed, and a new trial awarded.

Cited by Counsel, 5 Wh. 594; 9 C. 171; 19 S. 218; 7 N. 458; 8 W. N. C. 491.

Commented on, 4 W. 233; 1 N. 209.

Cited by the Court, 2 Wh. 130.

*[PHILADELPHIA, JANUARY 31, 1831.]

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The water power to which a riparian owner is entitled, consists of the difference of level between the surface where the stream in its natural state first touches his land, and the surface where it leaves it. It may be occupied in whole, in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy for a period commensurate with the statute of limitations.

A right by prior appropriation, has regard to the quantum of water drawn from a stream, common to both parties, and not to the quantum of fall.

An award of referees is to be set aside only for plain error in fact or law, and not for suspicion of error.

EXCEPTIONS TO THE REPORT OF REFEREES.

THE plaintiff was the owner of a tract of land, mill and water power on Tacony creek, and the defendant was the owner of a tract of land, mill and water power below the plaintiff's on the

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same creek. The plaintiff complained of being injured by the erection of the defendant's dam, whereby the water was backed upon the plaintiff's land, and it was referred to referees under the act of 1705, to decide whether the defendant's dam should be lowered, and to what extent, and what damage the plaintiff had sustained, if any, with power to award conditional damages to carry their award into effect.

The referees awarded as follows :—" We, the referees in the above case, having heard the parties, their allegations and proofs, and having personally examined the dams, mills, water power, and premises of the plaintiff and defendant mentioned and referred to in the rule of reference, do decide and award that the overfall of the dam of the defendant across Tacony creek, from wingwall to wingwall as it now is, shall be lowered nine inches and one fourth of an inch, and that the height thereof shall not in any part be less than two feet six inches and three-fourths of an inch below the centre of a mark made by us on the face of the rock on the westerly side of defendant's mill-pond, and that the minimum breadth of the overfall of the defendant's said dam, shall be the distance now between the said wingwalls, which is about one hundred and twenty-eight feet and six inches, which height and breadth we hereby fix as the proper height and minimum breadth of the overfall of the defendant's dam, and which height and breadth so fixed by us, shall be conclusive of the rights of the parties. And in pursuance of the authority given to us, and to carry our award into effect, we do further award to the plaintiff the sum of five thousand dollars as conditional damages, to be paid to him by the defendant, and for which the plaintiff shall be at liberty to take out execution on the 31st day of December, 1830, unless the defendant *shall [*85] on or before the said 31st day of December, 1830, reduce and lower his said dam, between the said wingwalls, to the height so as aforesaid fixed by us as the proper height thereof."

(Signed) { SETH CRAIG,
ROBERT TOLAND,
CHARLES BIRD.

The defendant filed the following exceptions to the award :

"1. Because the referees have made their award upon the ground that the dam of the defendant was originally higher than he was entitled to make it, which was plainly against the evidence.

"2. Because they have made their award upon the ground that the dam of the defendant was raised, after it was first erected, to a greater height than he was entitled to raise it, which was plainly against the evidence.

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"3. Because they have made their award upon the ground that the plaintiff after the erection of the defendant's dam has a right to sink or reduce his water-wheel, and that if by so doing the water was backed by the defendant's dam against the plaintiff's wheel, the defendant was bound in point of law to lower his dam.

"4. Because they have made their award upon the ground, that the plaintiff after the erection of the defendant's dam, had a right to deepen his tail race, and that if by so doing the defendant's dam backed water into the tail race of the plaintiff, the defendant was bound in point of law to lower his dam.

"5. That in other respects the said award is against the law and evidence."

The plaintiff offered evidence to the referees to prove, that his tail race had been used in the place where it then was for fifty years: That on levelling the same in 1822, the fall from the bottom of the old wheel to the bottom of the tail race at the mouth, was twenty-six inches and three-fourths of an inch, and in 1825, the fall from the top of the sheathing under the old wheel was twenty-three inches: That a new wheel was afterwards put in on the same centre, which was lower at the bottom from twelve to thirteen inches and a half: That the tail race had been deepened accordingly from the mouth upward, but not at the mouth: That before the erection of the defendant's dam, to wit, in 1815, and when the plaintiff's mill was stopped, the tail race was always dry at the mouth except in time of freshets: That at the time of entering this action, and for several years before, the back water in the mouth of the tail race was from fifteen to eighteen inches deep, and stood seven inches upon the new wheel, when the defendant's dam was full; but when the water was drawn off by working the defendant's mill, which was frequently the case in dry times, and when the plaintiff's mill was stopped for want of water, the mouth of the tail race would become entirely bare.

*The defendant offered evidence to the referees to prove that this dam, when it was first erected, did no injury to the plaintiff: That it had not since been raised: That the water only rose, when first built, to certain holes in the dye-house, left for venting the dye liquor, and that it only rose to the same height now, by reason of the dam: That these holes have not since been changed: That the plaintiff had deepened the mouth of his tail race and removed obstructions in the creek below the same, so as to alter the natural state of the stream, and increase his fall. [*86]

The facts here presented, are selected from a mass of testimony,

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and are presumed to be sufficient for understanding the exceptions and opinion of the court, and to show the contradictory nature of the evidence submitted to the referees.

In support of the exceptions, the referees were examined, and gave evidence as follows:

Charles Bird testified, that the referees, as the most effectual mode of deciding the matter submitted to them, had the defendant's dam drawn off: That they then stopped it below, and had it filled to a certain point: That when the water flowed to the mouth of the tail race on M'Calmont's line, they stopped it from flowing in: That they went on the principle that M'Calmont had a right to use all the power on his land in his own way: That they did not consider that one neighbour had a right to throw the water over the line of another: That they did not consider so much the height of the dam when built, as at the time of the investigation: That they went upon the principle, that the dam raised the water nine inches and a quarter higher at M'Calmont's line, than if there were no dam there: That he, (the witness,) had no doubt there was water in the tail race from deepening it, and that there was a deepening at the line of the tail race after Whitaker's dam was built: That he was not satisfied that the creek was deepened below M'Calmont's line, and that if the plaintiff's tail race had been in its natural state, still the defendant's dam would have backed the water in it.

Seth Craig stated, that M'Calmont had from twenty-one to twenty-seven inches fall in his tail race: That he had taken out all his fall but about an inch: That by doing that, the water backed up on him considerably: That the referees lowered the water in the dam till it was level with the mouth of the race, and made a mark on the rock: That they then set the wheel in motion again, with all the power on it, and it raised the water in the tail race five inches and better: That they then endeavoured to fill the pond of Whitaker, but did not get it filled: That when the water was level with the holes in the dye-house, it rose in the tail race fourteen inches and better, from fourteen to fifteen inches: That deducting the water from the wheel left nine and a quarter inches of water in the tail race: That on this they made their award: That the dam, when originally erected, threw the water into the mouth of the tail race: That [*87] of the three surveys, *they took that of 1821, which was the lowest: That M'Calmont had, with that, clear vent for the water in the tail race, when the dam was erected: That the mouth of the tail race fills up every year: That at the time the referees made the experiment, when the tail race was dry, the water in the creek was fifteen inches: That the

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bottom of the mouth of the tail race, which is gravel, is not as deep as the bottom of the creek by twelve or fifteen inches; and that he was satisfied that the tail race was not deepened at the mouth.

Robert Toland testified, that the referees were of opinion, that the mouth of the tail race had not been deepened at the line: That they believed Mr. White's evidence, who said there was no deepening of the creek: That they felt no doubt that the tail race was not deepened at the line: That that was not a question distinctly decided by the referees: That they did not give credit to the witnesses who stated, that the bed of the creek was deepened; and that when they made the experiment, they were satisfied, that the whole creek was then flowing in its natural channel.

T. Sergeant and Chauncey for the defendant.—The facts of the case are clear. The defendant's dam has never been raised since its first erection in 1815. All the evidence concurs to establish this fact. It did not, when erected, throw the water over the plaintiff's line. The referees now think, it throws the water back nine miles. But this was not occasioned by the act of the defendant; it could only arise from the deepening of the mouth of the race to that extent, and the defendant afterwards digging down his race, by which the back water was let in. One of the referees, Mr. Bird, thinks it clear it was deepened, and in this he is sustained by the evidence. Mr. Craig thinks it was not, but this opinion is irreconcilable with the fact, that the dam had not been raised. If it is clear, that the race was deepened after the dam was erected, and that thereby the water was thrown back, this result was produced by the act of the plaintiff himself, and he has no cause of complaint against the defendant. He had no right, as the referees suppose he had, to use this additional fall, after the defendant had erected his dam. The referees never examined the question, whether the plaintiff could deepen his race, after the dam was erected, and let in the water. They examined the premises, and judged principally from that examination, without advertng to the evidence of what had been done, or what the plaintiff had a right to do. The question turned upon the defendant's rights in 1808, and not upon the state of things, as they now exist, affected by the acts of the plaintiff. No changes were made by the defendant: all was done by the plaintiff, and even while the controversy was existing. Prior to 1808, the plaintiff's mill was a small one: a wheel sixteen feet in diameter was then put in, and the race improved. In 1815, the defendant erected his dam, after which the water passed off freely. No change took place till 1817, nor was any

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[*88] complaint made until 1822. Our position is, that *if the plaintiff had the fall in 1808, and did not then use it, he could not, after the defendant had erected his dam, avail himself of it, and compel the defendant to conform to his alterations.

It is simply a question of the right to the use of the water of a running stream, which depends on a peculiar principle derived from the nature of the thing used. The only foundation of title known to the law, for the enjoyment of light, air and water, is occupancy. 2 Bl. Com. 13, 18, 403; 3 Kent's Com. 358; Hatch v. Dwight, 17 Mass. Rep. 296; Angel on Water Courses, 39, 48, 69; Appx. 21, 74, 170; 4 Co. Rep. 87. In relation to the right in question, the defendant was the prior occupant. The plaintiff's was not an ancient mill. For such portion of the fall as the plaintiff occupied prior to the erection of the defendant's mill, he was the prior occupant. About that there is no dispute, and he has not been disturbed in the enjoyment of it. But of that which he sought to occupy after the erection of the defendant's mill, the defendant was the prior occupant. The right in flowing water, is the right to use it, and no more. It is susceptible of no other. The law seeks, as far as it can, to give in everything a definite and exclusive possession; but some things defy this effort, and in reference to them, a different rule is, from necessity, adopted. Among these things are light, air, water, and animals *feræ naturæ*, which lie in common and are open to the first occupier, who has the right or exclusive title, by virtue of occupancy alone. If a man erects a habitation near his neighbour's tanyard, the air may be unpleasant, but he has no remedy. So, if he builds against a wall previously erected. The rule with respect to a running stream is *aqua currit, et currere debet*. No one can stop it, or entirely divert it from its natural channel; but every man may use it for cattle, irrigation, mills, &c., provided he does not injure a prior occupant. Before the defendant's dam was erected, namely from 1808 to 1814, each party had a right to use the water of the creek for mill purposes. The plaintiff had a right to take his whole fall, by digging down his race, and if after this the defendant had erected a dam, and occasioned back water, he would have encroached upon the rights of a prior occupant. The defendant had a right, on the other hand, to erect a dam and throw the water to the plaintiff's line, paying the intermediate owners as he did. This was no injury to the plaintiff. Their rights were equal. Each had the right to use the stream, observing the rule, *sic utere tuo ut alienum non lædas*. Where two rights are equal, occupancy determines and fixes the property. It is no answer to this argument, that the plaintiff's right on his ground, is taken away by the defendant's occupancy of his right on his ground.

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It is *damnum absque injuria*. If there be a pump in common, and the first occupant takes away the water and thus deprives another of the use of it, the latter may suffer a loss, but he is not injured. So here, whoever first exercised his right, and used the current, acquired the exclusive property in it; a property as sacred as that of any other description. The right acquired by *possession of twenty-one years, has nothing to do with [89] the present question. That right originates in the invasion of the exclusive property of another. It begins by an acknowledged wrong. There are three modes of acquiring such a right; by deed; by twenty-one years' adverse possession, and by occupancy of what was before in common. On this subject the books are uniform. It is true the plaintiff has a right to all his fall; but this is no more than a right to occupy it. But if he neglects to do so, and another occupies it, he cannot afterwards use it, to the detriment of the prior occupant.

J. S. Smith and Broom for plaintiff.—Unless a clear mistake of law or fact be satisfactorily proved, the court will not set aside an award. 2 Yeates, 513; 5 Serg. & Rawle, 52; 1 Bin. 59; 2 Wash. C. C. R. 58.

It does not appear that the referees are sensible of any mistake in law or fact, or are dissatisfied with their award.

In support of the first and second exceptions, the defendant's counsel assumes the fact, that when the defendant's dam was first erected, it was not of a greater height than he was entitled to raise it. This fact is not only not admitted, but the referees had ocular proof to the contrary, for when they filled the dam to the height of the holes in the dye-house, at which the water stood when the dam was first erected, the back water rose nearly fifteen inches in the plaintiff's tail race, that is to say, it occupied all the fall which had been in that race, except about six inches. But whether the dam as originally constructed or subsequently raised, caused the injury complained of, is entirely immaterial, except as to damages, which were not allowed; the true question being whether the dam caused the injury at the time of bringing the action. It would be vain to say that it cannot produce the effect, which is now obvious to our senses, because it did not do so fifteen years ago. It was enough for the referees to determine whether the dam caused the injury at the time of bringing the suit. They lowered the water in the defendant's dam, until it came to a level with the mouth of the tail race, and if the dam had not been again stopped, the mouth of the tail race would have remained free. But they closed it, and the water rose from fourteen to fifteen inches in height above the mouth.

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The referees were of opinion that the tail race had not been deepened at the mouth, and the rise of the water there, by closing the dam, was sufficient to support their award, independently of any inquiry into the origin and progress of the obstruction, before the time of bringing the suit. The first two exceptions must fail, as the referees did not make their award upon the ground stated, and if they did, there was evidence to support them, of which they were the judges.

As to the third exception, it is sufficient to remark, that the plaintiff may vary the use of the water within his lines according to his pleasure, so that he does not injure the rights of others. 3 Kent's Com. *356; Angel on Water Courses, [*90] 67, 68, 69, and Appendix, 170; 4 Mason, 404.

He may make his wheel as large or as small as he chooses, no one having a common use of the fall, and this principle was assumed by the referees; but if by so doing, the water was backed against the plaintiff's wheel, then the question will arise whether the water be backed above the level of the defendant's water line; and the referees having decided that the wheel as lowered was within the plaintiff's fall and above that level, they consequently admitted his right so to lower it, and to be protected in the use of it.

The fourth exception depends on the same principle as the third, to wit: The plaintiff had a right to deepen his race within his lines, and if he has deepened it below the defendant's water line, he must bear whatever injury he suffers to that extent; but if the defendant's dam cause water to flow in the plaintiff's race above the level of the defendant's water line, he must reduce to that extent. This principle was recognised by the referees, and by this court, 17 Serg. & Rawle, 373, and 1 Rawle, 218, are decided on the principle assumed that the owner of a mill below, has no right to back or swell the water beyond his line. The only use the defendant could make of the fact that his dam did not injure the plaintiff when erected, and has not been since raised, is the inference that the injury must have been caused by some act of the plaintiff. That was a question of fact to be decided by the referees, and they were satisfied by proof that the plaintiff had a fall in his tail race which was obstructed by the defendant's dam, and they did not decide when or how it was done; and the defendant's counsel admit in their argument, that the plaintiff was entitled to the fall he had before the erection of the defendant's dam, undisturbed by it.

The opinion of the court was delivered by

GIBSON, C. J.—The water power to which a riparian owner

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is entitled, consists of the fall in the stream when in its natural state, as it passes through his land, or along the boundary of it, or in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it. This natural power is as much the subject of property as is the land itself, of which it is an accident; and it may, in the same way, be occupied in whole, or in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy or enjoyment for a period commensurate with that required by the statute of limitations—a fact that is not pretended here; and as to right by prior appropriation, that has regard to the quantum of water withdrawn from a stream common to both parties, and not to the quantum of fall. The latter can be augmented only by subtracting from the proprietor above, by swelling back on him; or by appropriating a part of the adjoining proprietor's fall below, by excavating the channel within *his boundary, and carrying [*91] out the bottom on a level to some point on the inclined line of the natural descent; and it seems to me these were the principles, which guided the referees to the conclusion, at which they arrived. Instead of attending to parol evidence of the original height of the defendant's dam, as well as of present conformity to its original height, and inquiring of the fact of present injury by the state of the fact as it stood originally, they had recourse at once to the best evidence of which the case was susceptible—the evidence of their own senses. They proceeded to restore the creek to its natural state, by drawing off the defendant's dam till the mouth of the plaintiff's tail race, which is exactly where the creek issues from his boundary, was left dry; thus demonstrating with conclusive certainty, that for all the swelling above that point, the dam was an injury, provided the channel of the creek were not deepened for a considerable distance below the plaintiff's line. But even if such deepening existed with the licence of the proprietors below, (and it seems there are intervening ones,) the power thus gained by the plaintiff would be as much the subject of protection from injury as the power afforded by the stream within his boundary. But it seems the referees had regard to the right of the defendant, as far as the plaintiff's is concerned, as extending to the plaintiff's line; and we are to judge of the case in reference to the view they have taken of it. Now an award such as this, is to be set aside only for plain and palpable error in matter of fact or of law, and not for suspicion of error. The error pointed out is said to have been in the assumption of a right for the plaintiff to set his wheel at any level he might think proper, and

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a correspondent duty on the part of the defendant to furnish fall for the water to pass off by the tail race. The referees deny this assumption, and the method by which they proceeded, shows that no such principle was adopted. Again, it is said, (and this is the only part of the case, about which it seems possible to raise a doubt,) that they did not inquire into the fact of deepening the channel of the creek, because they deemed it immaterial. There was certainly satisfactory evidence of what is indeed admitted, a considerable deepening of the tail race. But this, it is evident, could have no effect on the result of the experiment to ascertain the all important fact of swelling the water in the bed of the creek at the plaintiff's boundary. There was, however, evidence of stones or gravel having been taken from the creek, which the arbitrators say, they considered to be of little value; and I think it was rightly so considered, inasmuch as it was viewed in reference to a deepening immediately at the mouth of the tail race, and not an excavation carried along the bed of the creek into the land of the adjoining proprietor, so as to lower the level of the surface of the entrance of the tail race. They say they did not consider an excavation there as a thing that would produce an alteration in the relative level of the surface, but as a hole in the bottom, which would be merely filled with dead water instead of gravel or sand. But there was in [*92] fact no evidence *of such an excavation as would sink the surface of the water at the mouth of the tail race. If such there had been, it would either have been filled up, or its existence manifested in the overfall consequent on drawing off the defendant's dam; nothing of which appears to have been discoverable. But the referees, who are the exclusive judges of the credibility of the witnesses, say they were not convinced of the existence of any improper deepening; and in this it seems to me, they judged accurately. In addition to the evidence of the channel itself, which showed no trace of such deepening, it seems pretty clear, that the plaintiff had from twenty-one to twenty-seven inches of fall in his tail race; and that having enlarged his wheel so as to sink the under part of it but thirteen inches and a half, it now stands from six to eight inches in back water. An ingenious manipulation of the testimony might perhaps involve the case in obscurity; but these are facts of which there is little doubt or perhaps dispute; and the conclusion from them is inevitable. There is, therefore, to be judgment on the award.

HUSTON, J.—The subject of the use of a flowing stream, and the nature and extent of the right to this use, are of much importance; may come into discussion under a great variety of

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circumstances, and may require very nice discrimination in the application of principles in the different cases which will occur. It is very common to assume a general principle, or principles, without a very extended view of the subject; without considering all the cases which then exist or may arise. The general principle thus assumed may be correct in the case under consideration, and not correct on a different state of facts and rights. Is it then a general principle? Although it is stated as one by the judge who delivers it, and has been repeated as such never so often, yet if a case not before thought of, occurs, if a person assuming that principle as universal, proceeds to act on it, in a way to produce undue advantage to himself, or injury to another, it is the duty of a court, to consider carefully, and if necessary, to modify or limit the extent of the principle.

It may be admitted that, generally, a man has a right to use all the fall in a stream of water, from the place where it enters his land to the spot where it leaves it: nay more, that if at the first erection of his machinery he did not use it all, he may change his site within his land, or raise his dam to flow it back to his line, or deepen his tail race as low as he can, so as to deliver the water into its natural channel at his lower line. But he cannot raise his dam so as to throw the water back on the man above him; nor can he dig his tail race through the land of the owner below, so as to deliver the water into its natural channel at a point where that channel is lower than at his own line; nor can he go into the channel of the creek in the farm below, and deepen that channel so as to make the bottom of the creek lower at his own lower line, than it was in a state of nature. He has no better right to blow rocks, or dig out gravel, or *clay, in the channel of a creek below his own line, than [r*93] he has to go into the fields below and dig a race: in either case he commits a trespass on the man owning below. If he could do either, he could take from the owner below all that person's fall and add it to the tract above. In the case before us, the person below had all the rights which have been stated, as fully as the plaintiff had: to the lower line of M'Calmont he could dam back the water, and no farther; but his right existed, as the creek, both at the bottom and top line of the water, was in a state of nature.

Every man who has seen a stream of water, knows that its bottom is not a regular inclined plane. If it were, the depth and the current would be equal; it is often very far from it; for many yards we find it almost a stagnant pool, and several feet deep; immediately below this we find a ledge of rock or of slate, or of hard pan, over which the water flows only a few inches in depth, and flows rapidly, and exhibits a ripple of more or less

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length, or a succession of ripples. Now if you dig away the hard pan or gravel, or blow out the rocks, the whole length of these ripples, to the depth of a foot or two, you change the pool above, and its surface is sunk a foot or two. Suppose the line of the tract above crossed the creek over this pool; by taking down the bottom of the creek below, the owner of the land above can then lower the surface of the water on the tract above—can do so? But can he do it legally? Certainly he cannot.

Suppose in a state of nature there was four feet fall in the space of one hundred yards in the land below; if M'Calmont could dig out all this fall, so as to make it level for the whole of the hundred yards, he would have four feet fall at his own lower line, and by sinking his tail race up to his wheel, could sink his wheel four feet, and make four feet addition to his head; but if the man below cannot dam back on this new wheel, he has taken four feet of water power from the man below, and that he has no right to do. The principle then is, that he may use all the fall from his own upper to his own lower line, but he cannot add to that by sinking the bed of the creek on the land below: and this last limitation is as essential and important to M'Calmont, the plaintiff, as to the defendant; for, if the plaintiff can do this, the man above him may do the same thing. Rowland could then sink the bottom of the creek on M'Calmont's land and on his own land above, and lower his wheel, so as that M'Calmont's present dam will throw back water on his wheel, and then sue him; and the principle adopted by these referees will lower M'Calmont's own dam, and so it may proceed from dam to dam to the head of the stream.

The rule must be, that a man has a right to dam back the water to his own upper line, as the water was, and as the bottom of the creek was in a state of nature, when he built his dam; and the man above, although it is possible to sink the bottom of the creek so as to make the dead water to extend, and the back water to stand over and on to his own land, he does not and he cannot make the man below a trespasser by so doing.

[*94] *It seems to me then, there was an essential error in law in the principle as applied to the case before the arbitrators. The important inquiry, perhaps the sole inquiry, or rather inquiries were, did Whitaker's dam, when originally built, dam the water at all on the plaintiff's land? If it did not, has it been raised since? The arbitrators say, they were disposed to disbelieve the witnesses as to deepening the bed of the creek, but were of the opinion that the dam of Whitaker had not been raised since its first erection; but they all thought it immaterial whether the bed of the creek at and below the plaintiff's line, had or had not been deepened. It does not appear to have oc-

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curred to them, that by the sole act of deepening the bed of the creek below, and then sinking his own tail race, M'Calmont can set his wheel as low as the foundation of Whitaker's dam; in other words, take away the whole of Whitaker's water power. I assume it, that Whitaker had become the owner of the water power all the way up to M'Calmont's line. That Whitaker's dam has never been raised, is proved in so many ways, and so certainly, that it cannot be doubted. That it did not at first occasion the water to overflow M'Calmont's land is proved; I may say, admitted; the plaintiff's own witnesses all say so. There is contradictory evidence as to blowing out rocks at the mouth of the tail race, and in the bed of the creek below, and the referees, or some of them, say they rather believed those called by the plaintiff. There are, however, cases in which a matter is proved incontestibly by the nature of things. If Whitaker's dam did not throw any back water on the plaintiff's land when it was built, and has never been raised, it would not throw any back water on it now, unless the plaintiff had lowered the bottom of the creek, and of his tail race, unless there is some late discovery about the level of water, which I have not learned.

I consider this, then, a case of plain and palpable mistake of both fact and law, and would have set aside the report. I would have set it aside if there were reason to suspect that the matter had not been viewed in the true light. The plaintiff will allege this settles the rights of the parties finally; I would then be certain they were settled rightly. There is no good reason why a report of three men should have more sanctity than a verdict of twelve instructed by a judge. The law makes them equal: I would not give any preference to the report.

Judgment on the award.

Cited by Counsel, 5 Wh. 463, 594; 9 W. 119; 8 H. 88.

Cited by the Court, 4 W. 297; 2 H. 269; 9 Wright, 66.

*[PHILADELPHIA, FEBRUARY 2, 1831.]

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The Commonwealth *against* Ruff.

It is not necessary that the warrant of a county treasurer for the commitment of a delinquent collector of taxes, should show upon its face, that such previous proceedings were had under the act by virtue of which it was issued, as authorized the treasurer to issue it. Nor is it necessary that it should appear, that at the time and place mentioned in the warrant issued by the commissioners of the county to the collector, at which he was required to pay over the taxes collected by him to the treasurer, the board of commissioners were in session, ready to make "abatement or allowance for mistakes" in the dupli-

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cate, or for "indigent persons" therein named and assessed, who were unable to pay, &c.

It is not necessary to the validity of such a warrant, that it should run in the name of "The Commonwealth of Pennsylvania." It may issue in the name of the county treasurer.

HABEAS CORPUS.

THE whole of this case is embraced by the opinion of the court, which was delivered by

KENNEDY, J.—This was a writ of *habeas corpus ad subjiciendum*, &c., to the jailor of the city and county of Philadelphia, returnable January 21st, 1831. By the return it appeared, that the relator John S. Furey, has been committed under a warrant from the treasurer of the county of Philadelphia for being a delinquent collector of taxes of Dock ward in the city of Philadelphia.

The warrant is in the following words:—"Philip Peltz, the treasurer of the county of Philadelphia, to the sheriff of the county of Philadelphia, greeting. Whereas, on the eleventh of March, A. D. 1830, the commissioners of the county of Philadelphia, appointed John S. Furey, collector of the county taxes for Dock ward in the city of Philadelphia, assessed in the year eighteen hundred and thirty, and on the tenth day of June, A. D. 1830, they delivered to the said John S. Furey, a duplicate of said taxes, amounting to the sum of eight thousand and fifty-two dollars and ninety-one cents, due on the said duplicate, and the said John S. Furey has neglected and refused to pay over the same, but has paid over only the sum of six hundred and ninety dollars, leaving the sum of seven thousand three hundred and sixty-two dollars and ninety-one cents unpaid and unsettled, for which the said John S. Furey is delinquent. You are hereby commanded to take the body, and to seize and secure all the estate real and personal, of the said John S. Furey, and make return of this warrant, and of what you may do in pursuance thereof at ten o'clock, on Saturday, the fifteenth day of January, A. D. 1831, at the office of the county commissioners, and notify the said John S. Furey [96] "of the time and place of the said *meeting. Given "under my hand and seal in pursuance of the act of assembly, of the eleventh of April, 1799, this eleventh day of January, A. D. 1831."

"Philip Peltz, County Treasurer." [Seal.]

It is said, that this warrant is void because it does not appear from the face of it, that any such previous proceedings were had

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under the act of assembly therein mentioned, (see 3 Smith's S. L. 393,) as would authorize the treasurer to issue it: That all these proceedings, if they ever did take place, ought to have been recited in the body of the warrant; and especially ought it to have appeared, that at the time and place mentioned in the warrant, issued by the commissioners of the county to the collector, at which he was required to pay over the taxes collected by him to the treasurer, agreeably to the 15th section of the act already referred to, the board of commissioners were in session, ready to "make abatement or allowance for mistakes" in the duplicate, or for "indigent persons" therein named and assessed, who were unable to pay, &c., and after this being done, the relator might have proceeded to "demand and receive the remainder of the tax."

It is admitted, that the tax was assessed; that Furey was appointed the collector of it, and that he received a warrant and duplicate for this purpose from the commissioners. Indeed, this appears from the recital contained in the warrant of the treasurer. It further appears that Furey paid none of the money received by him upon his duplicate to the treasurer on the thirteenth day of July, 1830, which was the day fixed for that purpose in his warrant from the commissioners; nor did he pay any for some time afterwards, when he paid six hundred and ninety dollars out of eight thousand and fifty-two dollars and ninety-one cents. With this last sum he was charged on the books of the commissioners, according to the direction of the 12th section of the act aforesaid. He is credited with the six hundred and ninety dollars paid, but it is alleged that Furey has a right to claim an "abatement or allowance for mistakes" in his duplicate, and for and on account of "indigent persons" assessed, who were unable to pay, and that it does not appear upon the face of the warrant of the treasurer, or otherwise, that a board of the commissioners was in session on the thirteenth July, 1830, at the place appointed in their warrant to the collector, to afford him the opportunity of claiming and having such "abatement and allowance" made to him; and that until all this be shown, it must be taken, that the treasurer had no authority to issue his warrant.

It does not appear, however, nor has it been positively asserted, that Furey has any just ground for claiming an "abatement or allowance" for and on account of the cause set forth in the act of the legislature, made in this behalf. If he has no good reason for claiming it, it ought not to be allowed. On the contrary, if he is justly entitled to any allowance, it ought to be made. Why has not this been *done? How could it have been done without the application of Furey? How [97] were the commissioners to know that he had such a claim, if he

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failed to mention it to them? If such a right existed, he might avail himself of it, or waive it as he pleased, inasmuch as no one could be injured thereby, but himself. If, however, he intended to assert it, it was certainly incumbent upon him to apply to the commissioners, and to make his case known to them. It would be most unreasonable to presume, that the commissioners prevented him from making this application. It may be observed, that at the same time or place appointed by the commissioners in their warrant to Furey for making his application for such "abatement or allowance," the performance of a positive duty, which he owed and had undertaken for the benefit of the public was enjoined, that is, the payment to the treasurer of all moneys collected and received up to that time upon his duplicate. In this respect he was required to appear and make a return of what he had done upon the warrant put into his hands. This, it seems, he neglected, or perhaps, his counsel would say, that neglect was not to be imputed to him in this, because it has not been shown, that the treasurer attended at the time and place appointed to receive the money.

The duty and situation of a collector here, is not unlike that of a constable, into whose hands an execution is delivered. By the 12th section of the act of the 20th of March, 1810, giving justices of the peace jurisdiction in certain cases where the claim of the plaintiff does not exceed one hundred dollars, it is provided, that on delivery of an execution to any constable, an account is to be stated in the docket of the justice, and also on the back of the execution, of the debt, interests, and costs, from which the constable shall not be discharged, but by producing to the justice, on or before the return day thereof, the receipt of the plaintiff, or such other return as may be sufficient in law. Upon failure to make such return or in case of a false return, the justice is directed to issue a summons against the constable, requiring him to show cause why an execution should not be issued against him for the amount of the one put into his hands. Here the constable is charged in the justice's docket with the amount of the execution delivered to him, as the collector is charged in the commissioners' books with the amount of the duplicate delivered to him; and in order to discharge himself from the amount of the execution, he is to make a return of it to the justice on or before the return day. Now is it possible, that in a proceeding against the constable to obtain execution against him for not having made return to the justice, of the one put into his hands, that it must be proved or even alleged, that the justice was attending at his office on the return day, to receive the return of the execution from the constable? Such a thing was never thought of, yet there can be no doubt, but the

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absence of the justice from his office, and its being shut up from the time that the execution came into the hands of the constable, until after the return day of it had elapsed, would sufficiently excuse *him for not having made a return of it on the proper day. But such an apology will not be presumed. [*98] On the contrary, it will be presumed, that there was nothing to prevent him from performing his duty, and thereby discharging himself from his official responsibility. If he were so prevented, he must prove it. So in the case before us, Furey was charged in the commissioners' books with the amount of the duplicate upon the delivery of it to him. He was required to make return by a particular day, to pay over all moneys received, and at the same time report any mistakes, which he, in the meantime, might have discovered in the duplicate, as also all "indigent persons" therein assessed, who were unable to pay, that he might be exonerated *pro tanto*. This was a positive duty enjoined upon him; he was just as much bound to do all these things as the constable in his case, in order to obtain relief. Upon what principle can it be presumed for him, that he appeared at the time and place appointed to pay over the moneys received by him to the treasurer, and to claim of the board of commissioners an "abatement or allowance" for the causes before mentioned, but that the treasurer or the commissioners were not there? Even in the case of one man being bound to pay a sum of money to another at a particular day and place, he must show that he was in attendance at the time and place appointed for the payment of the money, having it with him prepared to pay it, although he to whom he was to pay it, did not attend at all, otherwise he will be in default, and liable to be sued upon his obligation for the money, and compelled to pay costs as well as the debt and interest. If such be the effect of an obligation growing merely out of a contract made for the benefit of a private individual; how much stronger must the reason be for requiring it of him, who has undertaken to perform a duty, in which the public is interested, and arising out of an obligation created by both law and contract?

It is apparent, that the law would defeat itself, if after having imposed a duty, which was not performed, it were to presume, without any, the least shadow of proof, that some legal impediment had intervened to prevent the discharge of it. It is well settled, that if a legal excuse does exist for not having performed a legal obligation, either of a private or public nature, it must not only be declared, but proved. In the present case had it even so happened, that a board of the commissioners was not in session on the day at the proper place, and that the collector had attended; still he would not thereby have been ab-

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solved from all further responsibility. Such an occurrence might readily happen from sickness, or other unavoidable cause without any sort of blame attaching to any one. In such a case I would consider it the duty still of the collector to seek an early opportunity of meeting the commissioners, when sitting as a board, to transact business, and to lay before them his reasons for "abatement or allowance," and obtain their decision, which ought certainly to be given as if it had been done on the day first appointed. I think it right that the collector should call in [*99] this case upon the commissioners, *because they can know nothing of his case until he shall have informed them. And if his claim be well founded, every principle of justice requires, that it should be allowed. I would also think it right that the same course should be pursued in a case, where some unavoidable cause has taken place to prevent the collector from attending the commissioners to claim allowances, &c., on the day assigned in his warrant. But if the collector lies by and neglects to apply for relief, until the time within which he is required by law to collect and pay over the whole amount of his duplicate, has elapsed, I see no reason why he should not be proceeded against by the treasurer as a delinquent collector, in the same manner as if an abatement or an allowance had been made to him.

The court think that enough has been shown in this case to authorize the county treasurer to issue his warrant against Furey.

It is urged in the last place against the validity of the warrant, that its style is not "the Commonwealth of Pennsylvania;" and this is required by the 12th section of the 5th article of the constitution of the state. To judge fairly of the requisition contained in this section as to this matter, it will be necessary to ascertain the object and design of it. From the first section of this article of the constitution, it appears clearly to have been the intention of the framers of that instrument to provide exclusively for the establishment and regulation of the judicial power of the commonwealth. All the preceding sections of this article are confined to courts, and the judicial officers therein named, and provided for, among the number of which it will not be pretended that a county treasurer is embraced. After declaring and setting forth the several courts and officers in which the judicial power of the commonwealth shall be vested, and the tenure by which most of the officers therein named shall hold their respective offices, it proceeds to delineate and distribute the jurisdiction and power to be exercised by each, until we come to the 12th and last section, which in some degree prescribes the form that is to be observed in the exercise of this power, as also in the means necessary to be used in order to

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accomplish it. The commencement of this section is in the following words:—"The style of all process shall be, the Commonwealth of Pennsylvania."

It is a rule in the construction of all instruments, that the subject-matter of them must be closely attended to and not overlooked. By the application of this rule we are necessarily led to the conclusion, that the word "process," in this place was intended to refer to such writs only, as should become necessary to be issued in the course of the exercise of that judicial power, which is established and provided for, in this article of the constitution, and forms exclusively the subject-matter of it. If there remained any doubt of this, it is removed by the universal practice, both legislative and judicial, which has prevailed in the construction of the remaining part of this section, which declares that "all prosecutions shall be carried on in the name of the Commonwealth of Pennsylvania, and conclude against the *peace and dignity of the same." In the act passed [100] the 22d of April, 1794, "for the prevention of vice and immorality and of unlawful gaming," &c., the legislature have given a form for a conviction in such prosecutions as are therein directed to be commenced against those, who shall violate the provisions of the act; in which no regard seems to be had to this clause of the constitution. Many summary prosecutions and convictions have occurred under this act without such conclusion, and been afterwards removed by *certiorari* into the courts of Common Pleas, as also some of them into the Supreme Court, where the legal knowledge and ingenuity of counsel have been employed in assigning errors, but such an exception, as that the prosecution did not conclude "against the peace and dignity of the Commonwealth of Pennsylvania," was, as I believe, never heard of, and I dare say, never thought of. It has never been considered as extending to prosecutions, other than those carried on by indictment found in some of the courts referred to in this fifth article, and where, anterior to the revolution, it was the rule and practice to conclude such prosecutions "against the peace and dignity of our lord the king." It was a requisition of the constitution of 1776, purposely framed and designed to meet the state of things produced by the revolution, in which the majesty of the people under the name of the Commonwealth of Pennsylvania was to be displayed, as exercising the reins of government, instead of the king of Great Britain. From that it has been introduced into the present constitution without intending to change its effect. It was no doubt intended, as has been said by the counsel for the commissioners, in support of the warrant of the treasurer, to be a substitution of the name of the Commonwealth of Pennsylvania for that of king, in all process

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and prosecutions, where it was necessary to use the name of the king before the revolution. The warrant is literally what the act of assembly would seem to require, the warrant of the county treasurer, given by him under his hand and seal. The prisoner must be remanded.

P. A. Browne, for the prisoner, cited *The Commonwealth v. Alexander*, 6 Binn. 176.

Dallas and *T. Sergeant*, for the Commonwealth, 3 Chitty Crim. Law, 338; 12 Serg. & Rawle, 348; 1 Chitty Crim. Law, 39; Jacob's L. D.; Hawk. B. 2 Ch. 16; 1 Chitty Crim. Law, 109; 9 Serg. & Rawle, 277; 4 Yeates, 205; 1 Serg. & Rawle, 92; 1 Chitty Crim. Law, 335.

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*[PHILADELPHIA, FEBRUARY 4, 1831.]

Snowden and Another *against* Warder.

IN ERROR.

Evidence is admissible to prove, that by custom or usage, in Philadelphia, on the purchase and sale of cotton, the vendor shall answer to the vendee for any latent defect in the article sold, though there be neither warranty nor fraud on the part of the vendor.

A party who alleges error in the admission of evidence by the court below, must show in his bill of exceptions what the evidence was; otherwise the exceptions to it will be considered as waived.

ERROR to the Court of Common Pleas of the city and county of *Philadelphia*.

On the trial of this cause, the plaintiff below, William S. Warder, offered evidence to prove, that it is the custom of trade in Philadelphia, in respect to the purchase and sale of cotton, that the vendor shall answer to the vendee for any latent defect in the article sold, which shall upon examination be discovered, without either warranty or fraud on the part of the vendor. He also offered evidence to prove such custom, where the damage arises from fraud in packing, on the part of the exporter of the article, unknown to the vendor.

He further offered evidence to prove, that by the custom of trade in Philadelphia, the vendor of certain other merchandise is liable to the vendee for any latent defect in the article sold, without warranty or fraud on the part of the vendor.

To the admission of all this evidence, the counsel for the defendants below objected, but a majority of the court, composed

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of the two associates, (Hallowell, President, not concurring with them,) admitted the evidence, and at the request of the counsel of the defendants below, sealed a bill of exceptions.

After the evidence above stated had been admitted, and it had been proved that the defendants below, had sold to the plaintiff below, fifty bales of cotton, of which a portion was damaged, the counsel for the defendants requested the court to instruct the jury as follows :

First. That the defendants, as vendors of merchandise within the city of Philadelphia, were not by law liable to the plaintiff as vendee, for any latent defect or damage in the article sold, unless there be a warranty by, or fraud on the part of said vendors.

Second. That a custom among traders in the city of Philadelphia, that the vendor of merchandise shall be liable to the vendee for any latent defect or damage in the article sold, without warranty or *fraud on the part of such vendor, is con- [*102] trary to law, and not binding on the defendants.

Third. That a custom among traders, engaged in buying and selling cotton within the city of Philadelphia, that the vendor shall be liable to the vendee for any latent defect or damage in the cotton sold, without warranty, or fraud on the part of the vendor, is contrary to law, and not binding on the defendants.

Fourth. That a custom among traders in the city of Philadelphia, that the vendor of cotton shall be liable for fraud in the packing, with which the said vendor had no privity, connection or knowledge, and in the absence of any warranty or fraud by such vendor, is not sufficient in law to charge the loss in consequence of such fraud on the vendor, nor is such custom binding on the defendants.

Fifth. That a custom, to be good and sufficient in law, must have been immemorial and uniform, and must be certain, compulsory and reasonable, and is not binding on the defendants, unless possessing all these qualities.

The majority of the court, composed of the two associates, refused to charge the jury upon any of the said points, according to the request of the counsel for the defendants, but delivered their opinion as follows :

First. That the evidence proved a custom, by which the plaintiff could recover, if he had brought himself within it, without warranty or fraud on the part of the defendants.

Second. That whether he had brought himself within it, was a question of fact for the jury, depending, among other things, on the question whether the damage had been discovered, and the defendants notified of it in a reasonable time.

Third. That if the plaintiff knew the defendants were con-

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signees or agents in the sale made by them to him, and if they had before the discovery of damage, and demand made, settled with and remitted the proceeds to their principal, the defendants were not responsible.

To this opinion also, the defendants' counsel excepted.

Chew, for the plaintiffs in error, contended that no evidence can be legally admitted to establish a custom, in a particular portion of the state, and not extending to the state at large. It had been repeatedly decided in this country as well as in England prior to the revolution, that such a custom cannot be proved. *Edie v. The East India Company*, 2 Burr, 1222; *Stoever v. Whitman*, 6 Binn. 416; *Thompson v. Ashton*, 14 Johns. 316; *Dunhower v. Bull*, 16 Johns. 375; *Séixas v. Wood*, 2 Caines, 54; *Perry v. Aaron*, 1 Johns. 132; *Jackson v. Wetherill*, 7 Serg. & Rawle, 480. In *Gordon v. Little*, 8 Serg. & Rawle, 533, it is true, evidence was held to be admissible, tending to show the custom with respect to the liability of common carriers on the western waters of this state, but the opinion of the court on this point was not unanimous, and Chief Justice Tilghman, who was one of the majority, said, that a [*103] party who sets up a custom, must satisfy *the court that the case is not embraced by the general rules of law. There was no general rule of law which extended to carriers on the western waters, and therefore evidence of custom was received. The same observation may be made with respect to the way-going crop, as to which, a custom was allowed to be proved, in *Stultz v. Dickey*, 5 Binn. 285. The distinction is between cases in which there is, and those in which there is not a general rule of law. With respect to the case before the court, the general rule of law is well established, and cannot be controverted by evidence of custom.

But supposing evidence to be admissible to prove a custom of trade, relating to the article which was the subject-matter of the contract, the admission of evidence to prove a custom as respects merchandise of a different kind was clearly wrong.

The court did not hear *M'Irvine*, who was of counsel for the defendant in error.

The opinion of the court was delivered by

Ross, J.—The common law readily adapts itself to the regulation of the various and complicated transactions of civilized communities. If any alteration in the condition and habits of society require the introduction of new principles, the common law receives such modifications, as correspond to the change in the different departments of social and civilized life. This is a

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safe mode of legislating, and not liable to error. If a custom or usage be not universal in its operation, the common law nevertheless permits that class of citizens, who have adopted it in their dealings with each other, to avail themselves of it in construing and enforcing their contracts or agreements, unless, indeed, it be mischievous in its nature, or contrary to the general policy of the law.

The common law is truly entitled to our highest veneration; and, although it has been said by some to have been instituted by Brutus, the grandson of Æneas, and the first king of England, who died when Samuel was judge of Israel, and who wrote a book in the Greek tongue, which he called the Laws of the Britons, and which he had collected from the laws of the Trojans, it is nevertheless not entitled to our veneration on account of its antiquity; for nearly all that is valuable in it is comparatively of modern date. (See Preface to Third Reports.) Neither is it entitled to our respect on account of the ancient, absurd, and superstitious modes of trial; none of which have the slightest resemblance to our present trial by jury. Still less is it entitled to our admiration on account of the feudal system, which imposed a restraint upon every effort to improve the jurisprudence of the country, and which prevented the adoption of those maxims of justice and equity, which now render it the admiration of the enlightened jurist, and the favourite of the people. It is, however, entitled to our veneration, because it has, within the last two centuries, been moulded by the wisdom of the ablest statesmen, and a succession of learned and liberal minded judges, into a flexible system, expanding *and contracting its provisions, so as to correspond to the changes [*104] that are continually taking place in society, by the progress of luxury and refinement. As the youthful skin of a vigorous child expands with its growth, and accommodates itself to every development, which the body, in its progress to maturity, makes of its powers, capacities, and energies, so does the common law, in order to suit the exigencies of society, possess the power of altering, amending, and regenerating itself. It has been truly and eloquently said, that "it is the law of a free people, and has freedom for its end; and under it we live both free and happy. When we go forth it walks silently and unobtrusively by our side, covering us with its invisible shield from violence and wrong. Beneath our own roof, or by our own fireside, it makes our home our castle. All ages, sexes, and conditions, share in its protecting influence. It shadows with its wings the infant's cradle, and with its arm upholds the tottering steps of age." It is the duty of the judiciary not only to guard it with vigilance against incongruous innovations, but also to extend the operation

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of its principles, so as to embrace all the new and various interests, which arise among an active and enterprising people. Thus much for the common law.

In this case the questions presented for decision are found in the first two exceptions to the admission of evidence offered to prove the custom or usage in Philadelphia, with respect to the purchase and sale of cotton, viz., that the vendor shall answer to the vendee for any latent defect in the article sold; and also in the exceptions to the charge of the court on the evidence so admitted. As there is but one question presented by these exceptions, they will all be considered together. If the evidence were properly admitted, the defendant has no right to complain of the charge of the court; for if there be error in it, it consists in the charge being too much in his favour. The third exception should have set forth the evidence, which the court decided was admissible. This was necessary to enable us to determine whether the evidence was improperly received. This court will not presume that evidence was erroneously received. It rests with those who assign the error, to spread before us that which is alleged to constitute the error. On failure to do so, we must consider the point as waived. I will, however, on this point refer to Starkie's Evid. part 4th, page 453, where it is stated, that the manner of carrying on trade in one place may be evidence of the mode of carrying it on in another. For this position he refers to *Noble v. Kennoway*, Doug. 510-13.

In the quaint language of Sir Ed. Coke, "Consuetudo is one of the main triangles of the laws of England: those laws being divided into Common Law, Statute Law, and particular customs, for if it be the general custom of the realm, it is part of the Common Law." Co. Lit. 113-15.

It is contended, that the evidence was admitted to prove a custom of the trade inconsistent with the provisions of the common law. I [*105] think on a full examination of the subject, it will be found perfectly in accordance with the common law. But, even, if it be otherwise, was there any error in admitting the evidence for the purpose of showing the understanding of the parties to the contract? Littleton, in sec. 169, page 112, says, "a custom used upon a certain reasonable cause depriveth the common law;" and the comment of Coke is to the same effect. He says, "custom or prescription can take away all the force of an act of parliament;" and with this the doctrine in 1 Col. Jurid. 23, is perfectly in accordance. It is there stated, that by the statute 10 Edw. 3, c. 3, it is ordained, that all justices of Oyer and Terminer, &c., shall first make oath, &c. Precedent and usage prevailed over the statute; for no such oath

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prescribed by the statute was ever taken. In England there are four courts, formerly included in one, called the *aula regis*, which followed the king. They are now divided into Chancery, King's Bench, Common Pleas, and Exchequer, by custom alone. 1 Col. Jurid. 22. And among the enormous powers of the Chancellor, that which he exercises at his pleasure, of calling upon the judges to assist him in the decision of any perplexed and difficult case, it is believed, depends upon custom alone. All the pleadings which are said to be the pillars of the common law, rest on no better foundation than custom, varying according to the circumstances of each particular case, to which they are applied.

Particular customs are to be proved. Co. Lit. 115, b. In *Vanhearth v. Turner*, Winch. Rep. 24, Hobart, C. J., says, "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; and if any doubt arise to them about the custom, they may send for the merchants to know their custom, as they send for the civilians to know their laws." So in the case of *Pickering v. Barkley*, 1 Styles, 132, a question arose, whether taking by pirates was a peril of the sea. Merchants and experienced mariners were examined to ascertain the construction of a written contract. It is manifest from the authorities cited, that the custom of merchants may be proven, although inconsistent with the common law; and that a statute or the common law may be abrogated, modified, or altered by usage and custom. The custom of merchants was at first confined to foreign bills of exchange drawn by merchants, then extended to inland bills, and finally it has been held to extend to all joint traders of every description, for the purpose of excluding survivorship. *Jefferies v. Small*, 1 Vern. 217. See *Stark. Evid.* 453, and cases there cited in the notes.

In the case of *Donaldson v. Forster*, Abbot's Law of Ship. 213, it was stipulated, that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers. The defendant insisted, that under a charter party so worded, it was the constant usage of the trade to allow the master to take out a few articles for private *trade. *Ld. Kenyon* admitted evidence to be given to prove this usage; and said he [*106] thought the deed might be explained by uniform and constant usage; the usage being a tacit exception to the deed. *Starkie*, it is true, seems to think some doubt may still be entertained whether the receiving such evidence be strictly warranted in principle, but that doubt seems to be limited to cases of written contracts.

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To these authorities I will add one or two of more recent date, selected from the numerous decisions to the same effect, which are to be found in the books of reports. In the case of *Van Ness v. Pacard*, 2 Pet. U. S. Rep. 148, evidence was admitted to prove, that a custom and usage existed in the city of Washington, which authorized a tenant to remove any building erected by him. So in the case of *Osgood v. Lewis*, 2 Harr. & Gill, 495, a great variety of proof was admitted to show the understanding of dealers in winter-strained sperm oil. In *Smith & Stanley v. Wright*, 1 Caines' Rep. 44, the usage against the allowance of average to goods placed on the deck of the vessel, was proved by the testimony of several insurance brokers and merchants of long standing, some of whom carried it back thirty years, a period, say the court, too short to establish a custom or usage, but they add, "that the true test of a commercial usage, is its having existed a sufficient length of time to have become generally known, and to warrant a presumption, that contracts are made in reference to it." In the case of *Whipple v. Lovitt*, 2 Mass. Rep. 89, proof was admitted to show whether the words, "factory prices" had acquired any uniform technical meaning, in the sense contended for. In *Loring v. Gurney*, 5 Pick. Rep. 15, it has been held, that a usage of an individual known to the person with whom he deals, may be given in evidence to prove what was the contract between the parties. In *Gordon & Walker v. Little*, 8 Serg. & Rawle, 533, it was decided, that evidence of usage or custom fixing the construction of the words, "inevitable danger of the river," in a bill of lading for the transportation of goods by inland navigation, is admissible; and that usage or custom varying the liability of a common carrier by water from that of the common law, may be proved. In page 550, C. J. Tilghman says, "the parties have a right to alter or modify the common law, by a special contract;" and in page 565, Justice Duncan says, "the carrier may limit by contract the extent of his liability." So the usage and custom on particular waters may abridge and confine it, and such usage, in the absence of a special written contract, would control the general custom or law of England. It would be the adoption of a custom or law of the English realm; and he adds, that his opinion is, that if such a usage had been clearly proved, it would have controlled the general rule of law, because it would be evident that the parties contracted with a view, and in relation to the particular usage. See 2 B. & A. 746, *Webb v. Plumer*; 2 Eng. Com. Law Rep. 359; 7 Eng. Com. Law Rep. 203, and also a *note to *Yeates v. Pim*, in 3 [*107] Eng. Com. Law Rep. 39; *Stark Ev.* 1039, and the cases there cited.

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There is no rule of law better settled, than that the intention of the parties to a contract shall prevail unless inconsistent with some well established principle of law. The intention of the parties will not be carried into effect, if the contract be to do any immoral act; or if it be to omit the performance of any moral or official duty; or if it be contrary to the general policy of the laws, as to take more than six per cent. interest; or if it be in contradiction of the statute of frauds, or to defeat the operation of the revenue laws, &c. But a contract will be binding and carried into effect, if it be not inconsistent with morality, policy, or the duties which we owe to the community; in a word, if it be not to do something either *malum in se* or *malum prohibitum*, although such contract contravene or control the common or statute law of the land.

I therefore feel justified in laying it down as law,

1. That the parties may make a contract contrary to the provisions of the law, under the restrictions adverted to, or those of a similar character.

2. That wherever the parties may make a contract dispensing with, or controlling the provisions of the common law, the custom or usage of the trade will govern the construction of such contract, in all matters wherein it is silent.

3. That the true test of a custom or usage is its having existed a sufficient length of time, not only to have become generally known to the dealers, who are to be affected by it, but also to warrant the presumption, that contracts are made in reference to such usage or custom. And that this rule is not only applicable to commercial transactions, but also to the ordinary dealings between man and man; as for instance the right to take the way-going crop; to retain or remove fixtures, and numerous other instances, which it is needless to mention.

4. That either party has a right to prove a custom or usage in reference to the subject-matter of the contract; and that therefore there was no error in admitting the evidence in this case.

The judgment must be affirmed.

GIBSON, C. J.—In *Gordon v. Little*, 8 Serg. & Rawle, 557, I expressed my reasons for wishing to discountenance the recognition of local customs in derogation of the general law; and it would add little to their force to repeat them here. I feared then, what I fear now, that the decision was the harbinger of a train of exceptions that would, in the end, sap the foundations of the common law, by affording a pretext for the very worst species of legislation to which a people can be exposed, and subjecting the rights of the citizen to the perilous influence of parol

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proof. I admit that contracts are particular laws which the parties prescribe to themselves; but as regards matters about [*108] which they are silent, the presumption is that they *treat on the basis of the existing law, which they are bound to know, and not that of a particular usage, which they are not bound to know, and of which they may in fact be ignorant. Where they contract in reference to the usage, that fact ought to appear expressly by the terms of the bargain; else there will be no safety: and, in accordance with this principle, it has frequently been ruled by our courts, that usage is of no avail where the law is settled; instances of which may be found in Wharton's Digest, Evidence, *Q*. I am of opinion, therefore, that the evidence ought not to have been admitted.

Judgment affirmed.

Cited by Counsel, 4 R. 264; 5 Wh. 107, 168; 5 W. & S. 121; 1 C. 115; 3 G. 244, 277; 8 S. 79; 20 S. 49; 26 S. 431, s. c. 1 W. N. C. 78; 4 W. N. C. 476.

The first point as laid down by Mr. Justice Ross in this case was overruled in 7 H. 247, and 8 H. 453; and the doctrine of the earlier cases established, that a usage may explain a contract, but cannot contradict it or supersede the rules of common law. The third point, namely, what constitutes a custom or usage, has been followed: 8 S. 82; 14 N. 355. The rule of evidence laid down has also been followed: 11 H. 176; 10 C. 314.

END OF DECEMBER TERM, 1830.—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1831.

[PHILADELPHIA, MARCH 21, 1831.]

The Corporation for the Relief of Poor Distressed Presbyterian Ministers, &c., *against* Wallace and Others.*

A sale by the sheriff of a part of mortgaged premises, under a younger judgment against one claiming title under the mortgagor, exonerates the land sold from the lien of the mortgage, though the mortgage is not yet due, and no default has been made.

In such case, the part of the property not sold by the sheriff remains liable for such proportion of the debt due on the mortgage, as should be rated to its comparative value with the whole property mortgaged.

THIS was a *scire facias* on a mortgage issued in this court to March Term, 1822, by the plaintiffs against John B. Wallace and Susan his wife, mortgagors, and James Hunter, Joseph P. Smith, Charles Stewart's heirs, George Pepper, and Dorothy and Susan Davis, terre tenants.

The counsel of the parties agreed upon a special verdict, which disclosed the following facts.

On the 4th of September, 1805, John B. Wallace, Esq., and wife, mortgaged the premises described in the *scire facias* as city lots, Nos. 2017, 2018, and 2019, to the plaintiffs, for the payment of four thousand one hundred and eighty-seven dollars, fifty-seven cents, on or before the 15th of March, 1821, with

* For the report of this case, the editor is indebted to John K. Kane, Esq., by whom it was prepared for the press.

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[*110] interest; and the mortgage was *recorded on the 5th of September, 1805. Interest was paid by him to the 15th of March, 1821, but the subsequent interest and the principal remained unpaid, and the mortgage stood up to the present time unsatisfied on the record. On the 24th of June, 1823, Wallace confessed judgment on the mortgage, but without notice to the terre tenants. Writs of *levari* and *alias levari facias* issued thereon to July Term, 1824, and July Term, 1827, in this court, and were returned. A *pluries levari facias* issued to December Term, 1828, under which a levy was made, and the premises advertised for sale.

An agreement was then made in the case among the attorneys for the terre tenants, appointing commissioners, to ascertain among other things, the proportions in which the several premises covered by plaintiff's mortgage should contribute to the discharge of it, and to report to the plaintiff's counsel. On this agreement being made, the plaintiffs stayed proceedings on the *pluries levari*. Before the commissioners, however, the terre tenants having exhibited their titles, claimed to hold discharged from the plaintiff's incumbrance, and the commissioners therefore made a report.

The terre tenants all held under a conveyance of the mortgaged premises made by Wallace and wife on the 21st of February, 1810, to Gideon Cox in fee, for a full consideration. Their titles were derived as follows:

No. 1. On the th day of February, 1810, Cox conveyed to Charles Stewart a part of the premises, consisting of eighteen feet in front on Market street, by one hundred and eighty feet in depth, for the consideration of four thousand and fifty dollars; Stewart died leaving heirs, certain of the terre tenants.

No. 2. On the 6th of April, 1812, Cox conveyed, for a full consideration, to one Harris, a part of the premises consisting of thirty-six feet fronting on High street, by one hundred feet in depth; which, on the 24th of December, 1813, was sold by the sheriff under an execution against Harris from the District Court for the city and county of Philadelphia, to James Hunter, Esq., for seven thousand six hundred dollars, subject to certain mortgages made by Cox and Harris. The purchase-money was brought into court by the sheriff, and distributed upon the report of an auditor, among lien creditors of dates subsequent to the plaintiff's mortgage. Hunter afterwards paid off the mortgages made by Cox and Harris, amounting to seven thousand five hundred dollars.

No. 3. On the 29th of December, 1810, Cox conveyed for a full consideration to one Lewis, another part of the premises, eighteen by one hundred feet, adjoining the foregoing. Lewis

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afterwards conveyed it to one Bickley, and on the 8th of July, 1814, it was sold by the sheriff under an execution against Bickley, to one Fassitt—the purchase-money, six thousand seven hundred and fifty dollars, was paid by the sheriff into court, and there distributed among lien creditors of dates subsequent to the plaintiff's mortgage. Fassitt afterwards conveyed to Cresson, who mortgaged back to Fassitt for four thousand *dollars, and the premises were again sold by the sheriff under that mortgage on a *levari facias*, on the 17th of [*111] February, 1830, to A. B.

No. 4. On the 5th of November, 1816, Cox conveyed for a full consideration to Wallace a lot of ground, fifty-four feet by eighty feet, lying at the rear of the premises described above as No. 2 and No. 3, and part of the premises included in the plaintiff's mortgage. On the 13th of March, 1817, Wallace and wife conveyed to one Brogan in fee, two lots on Thirteenth street, fifty-four feet by forty feet of which, being the rear thereof, was part of the above fifty-four feet by eighty feet, and took two mortgages for the purchase-money, each of three thousand five hundred and eighty-three dollars and thirty-three cents. The mortgages were assigned by Wallace to one Pepper for a full consideration. Pepper sued out writs of *levari*, became the purchaser at the sheriff's sale for three thousand eight hundred and twenty-five dollars, received the sheriff's deeds, but being himself the plaintiff in the execution, paid no money except for the costs.

No. 5. On the 13th of March, 1817, Wallace and wife conveyed to one Grugin, a lot on Thirteenth street, adjoining the foregoing, fifty-four feet by twenty feet of which, being the rear thereof, was part of the same fifty-four feet by eighty feet, and covered of course by the plaintiff's mortgage; the consideration being a mortgage for three thousand five hundred and eighty-three dollars and thirty-three cents. On the 7th of October, 1818, this lot was sold by the sheriff on an execution against Grugin, to D. & S. Davis, for two thousand five hundred and seventy dollars, subject to the last-mentioned mortgage. The sheriff paid costs and judgments to the amount of six hundred and sixteen dollars and ninety-three cents, and paid the balance into court, where it was distributed among lien creditors of dates subsequent to the plaintiff's mortgage. Davis afterwards paid off the mortgage for three thousand five hundred and eighty-three dollars and thirty-three cents.

No. 6. On the 13th of March, 1817, Wallace and wife conveyed to one M'Indoo a lot on Thirteenth street, adjoining the foregoing, fifty-four feet by twenty feet of which, being the rear thereof, was part of the same fifty-four feet by eighty feet,

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and covered of course by the plaintiff's mortgage; the consideration being a mortgage for three thousand five hundred and eighty-three dollars and thirty-three cents. This lot was afterwards sold by the sheriff on an execution against M'Indoo, to one Stewart for one thousand five hundred and twenty-five dollars, subject to the last-mentioned mortgage. The sheriff paid costs and judgments to the amount of eight hundred and thirty-one dollars and thirty-six cents, and paid the balance into court, where it was distributed among lien creditors of dates subsequent to the plaintiff's mortgage. Stewart afterwards paid off the mortgage for three thousand five hundred and eighty-three dollars and thirty-three cents.

These six parcels together constituted the whole of the premises [*112] *covered by the plaintiff's mortgage, and against which their *levari* had issued.

There was no proof that either of the purchasers of any part of the premises had actual notice of the plaintiff's mortgage; nor was there any proof that the plaintiffs had actual notice of any of the *mesne* sales by the sheriff, or of the distribution of the proceeds thereof.

The sheriff's advertisements for the sales made by him, in no instance described the property, according to the description thereof made in the plaintiff's mortgage, viz., as city lots Nos. 2017, 2018, and 2019, nor as parcel thereof, or of any or either of them; nor did they indicate the former ownership of the mortgagor, Wallace; nor did they mention the premises for sale as part of a larger lot sold by him; but the several parcels of the entire premises, which were sold by the sheriff, were sold as the property of the respective defendants in the executions by whom they were then owned; each parcel so sold having at the time of sale a three-story brick messuage erected thereon; and each parcel so sold contained such a description in the levy, advertisement, and deed, by distance, from the north-east corner of High and Thirteenth streets, as to indicate its position or location.

The questions submitted to the court upon these facts, were "whether the mortgaged premises aforesaid, or any part thereof, and what part or parts, have been discharged from the lien of the mortgage of the plaintiffs in this suit, and if the said mortgage is a lien on some part or parts only of the mortgaged premises, whether it is so for the whole debt or only for a proportional part of the said mortgage debt."

Kane, Chauncey and John Sergeant, for the plaintiffs, and *E. K. Price, J. P. Norris, Wharton, Tilghman, Wm. Smith*, and *J. R. Ingersoll*, for the several terre tenants.

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Mr. *Kane*, for the plaintiffs.—The leading question in the case may be stated thus : does a sale by the sheriff of a part of mortgaged premises, under a younger judgment rendered against one claiming title under the mortgagor, destroy the lien of a duly recorded mortgage, which is not yet due, on which no default has been made ; where there has been no notice of the sale to the mortgagee ; and where the public advertisements of the sale, even if known to him, would have given him no information that the premises mortgaged to him, were to be the subject of the sale ? The only apparent exception to any part of this statement of the question, is the sale of No. 4, by Pepper to himself, before default of our mortgagor. Our argument of the question, will, however, apply to this case also.

It is said that this question has been already decided by this court in *Willard v. Norris*, at Sunbury, July, 1829, 2 Rawle, 56. But,

I. Though the judgment in that case was unanimous, the argument of Judge Tod, who pronounced it, cannot be considered as that of the whole bench, inasmuch as 1, it is at variance with the opinions of the court delivered by Gibson, J., in *Weidler v. Farmers' Bank*, 11 Serg. & *Rawle, 134, by Rogers, J., [*113] in *Gilmore v. Commonwealth*, 17 Serg. & Rawle, 277–8, and by Gibson, C. J., in *Ripple v. Ripple*, 1 Rawle, 386, 390, only eighteen days before the decision of *Willard v. Norris* ; and yet neither of these three decisions was impugned or even referred to in Judge Tod's argument. 2. It is directly opposed to the opinion of the Supreme Court of the United States in *Rankin v. Scott*, 12 Wheat. 179, yet does not refer to or impugn that opinion. Assuming that the case of *Willard v. Norris* decides authoritatively only the question which was raised by the record, it is inapplicable to the facts stated in this special verdict, and we are referred back to the law as understood, and for more than forty years settled ; *Levinz v. Will*, 1 Dal. 435 ; *Evans v. Jones*, 1 Yeates, 172, compared with 3 Sm. L. 158, 159. in note ; which are fully supported and amplified in the opinion delivered by this court in *Lancaster v. Dolan*, 1 Rawle, 245–6. If then it be law, as was decided in *Levinz v. Will*, in 1789, that “ the recording of a mortgage amounts to constructive notice to all men, and supersedes the necessity of express personal notice ; ” and if it be also law, as was decided in *Ripple v. Ripple*, in 1829, that “ a purchaser at a sheriff's sale with notice of its incumbrances, takes subject to them ; ” it follows as an unavoidable conclusion, that a purchaser at sheriff's sale of mortgaged premises, takes subject to the elder mortgage duly recorded upon them. And that such was the understanding of the bar

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appears by the agreement for contribution entered into by the defendant's counsel, to prevent a sale under our *levari*.

II. But admitting the opinion of Judge Tod in *Willard v. Norris* to be law, and that in general a sale by a sheriff under a junior judgment, discharges the land from the lien of a prior mortgage; yet this rule of law will not be extended to cases, to which the principles, on which it is founded, can have no application. Now the course of Judge Tod's reasoning in *Willard v. Norris*, is this:—The prior incumbrance creditor was entitled to claim payment of his incumbrance from a fund in the sheriff's hands; and as in bankruptcy, a debt provable, and a debt barred, are convertible terms. The incumbrance creditor had the means of knowing that there was such a fund, to which he might have recourse; for without notice actual or constructive, no one can be barred of a right, and there can be no constructive notice where knowledge is impossible. If from accident or ignorance, or other cause, he yet made no claim, the sheriff had the same knowledge, for he could ascertain the incumbrances by inspecting the records, and was bound to see the fund properly distributed to those rightfully interested. The argument therefore in *Willard v. Norris*, and the doctrine to which it leads, apply, 1st. Only to sales, where money has been paid, and was susceptible of distribution. 2d. Only to incumbrances, which appear of record to have been made by the defendant in the execution, or by some one under whom he claims by title itself of record in the county; for in all other cases the sheriff has no means of [*114] ascertaining the existence of the incumbrance. 3d. *Only to cases where it has appeared by the words of the advertisement, or by obvious inference from them, that the property sold is the same with that which was incumbered. 4. Not to cases where the incumbrance covers only a part of the property which has been sold integrally. 5. Not to cases where the incumbrance covers more than the property, which has been sold; for, first, a creditor having a right of recourse to two funds, is not permitted in equity to take from that which is the sole resort of another; and the mortgagee of the entire premises, therefore, not having been permitted to take the fund in the sheriff's hands, inasmuch as it formed the sole resort of the plaintiff in the execution, cannot be said to have been constructively paid by it; and, secondly, a creditor even by judgment, may waive his priority of claim on the proceeds of certain property, without extinguishing his debt or impairing his lien on other property. *Com. v. Alexander*, 14 Serg. & Rawle, 257, 263; *Gibson, C. J.'s opinion in Bank of Penn. v. Winger*, 1 Rawle, 295, 301, 302. 6. Not to cases, where from any cause the incumbrances cannot be defined or their amount calculated,

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as incumbrances with collateral condition of defeasance, *Lyle v. Ducomb*, 5 Binn. 585, or incumbrances contingent either altogether, or as to amount, which on that account would not be provable in bankruptcy, 1 Bac. Abr. 424, such as annuities for life, *Ripple v. Ripple*, 1 Rawle, 386, and interlocutory judgments. 7. Not to cases in which the incumbrance creditor is not, at the time of sale, entitled to payment of his debt, such as irredeemable incumbrances, ground rents in fee, and mortgages not due. A judgment, on which stay of execution has not expired, is otherwise: it is *debitum in presenti* though the law will not aid its compulsory collection till a future day. A mortgage till the day of payment is for a *debitum in futuro*, and until default contingent besides: time is of the essence of the mortgage contract. Each of these seven limitations affects either the whole or part of the sheriff's sales, which are alleged to have divested our mortgage; and the cases cited in support of the fifth, show that it remains valid for the full amount due on it, and the work of apportioning it belongs to the terre tenants. So modified and limited, the principle of *Willard v. Norris* does not apply to our case. If not so modified, it is at once unconstitutional, unsupported by authority, and at variance with the general opinion of the profession as evidenced by the practice; unconstitutional, because it impairs the obligation of the mortgage contract, and would divest the rights of an individual by a judicial proceeding, to which he is not a party, of which he has had no notice, and of which he had no possible means of knowledge: Unsupported by authority; for the only two cases cited by Judge Tod, as directly in point, *Com. v. Alexander*, 14 Serg. & Rawle, 257, and *M'Call v. Lenox*, 9 Serg. & Rawle, 306, 308, 313, avoid a decision of the principal question, and the *dicta* of the judges intimate the opposite opinion: Opposed to the general sentiment of the community, as was shown by the act of assembly, which was passed immediately after the decision in April, 1830; and opposed to the universal practice of the profession in this part of the *state at least, which assumed [*115] for its basis the immunity of an elder mortgage from divestiture by a sale under a junior incumbrance. This practice is recognised by the agreement of counsel in this case, and it must be kept in view while examining many of the arguments and decisions cited by Judge Tod. The general practice was for the sheriff to sell, if he could, clear of incumbrances: in such case he was bound to pay prior incumbrances, and if the proceeds of sale were adequate, subsequent ones also; and he was therefore entitled to the costs of his searches and to his poundage on the amounts paid. This is the key to the cases in 1 Browne, 97; 1 Binn. 97; 2 Dall. 131; 3 Binn. 358; 1 Serg.

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& Rawle, 324. But if the proceeds of the sale were inadequate to pay the prior incumbrances, the conditions could not be complied with, and the sale failed. When, however, it happened, that the defendant before judgment had by contract or conveyance divested himself of any portion of his rights; if he had artied to sell so as to pass an equitable interest; if he had leased and the lease was unexpired, or if he had mortgaged, and the mortgage was not yet payable, (unless, indeed, the creditor chose to accept his money before it was due,) in such case the sheriff never undertook to sell more than the defendant's remaining interest. The practice was simple, advantageous, and never misunderstood.

Mr. Wharton, for the terre tenants.—The question whether a mortgage is discharged by a sale under a judgment subsequent to it in date, may be considered as settled by the case of Willard v. Norris; but were it now debatable, we would show that the decision established no new law, overthrew no previous authority, impugned no settled practice, but simply recognised what necessarily grew out of legal provisions existing from the earliest periods of our history.

(The court informed the counsel that they were willing to hear the question argued as if it were *res integra*.)

Mr. Wharton.—The law of mortgages has from the earliest times been essentially different in this state and in England. They have uniformly been treated merely as a security or lien upon land for a debt, not as a conveyance of the land. Our ancestors, among other bold but salutary innovations, determined that lands should be liable for the payment of debts. In the frame of laws agreed upon in England, it was provided, "That all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods, and one-third of the land." (1 Sm. Laws, 9.) The acts of 1682, 1688, 1694, extended this to one-half of the land; and finally, the act of 1700, (1 Sm. 7,) declared, that "all lands and houses whatsoever shall be liable to sale upon judgment and execution." Lands being thus assimilated in this point to chattels, the same rule would necessarily prevail with respect to the consequences of a sheriff's sale. Now, it is settled, that on a sale of chattels by virtue of a *fiery facias*, all previous liens, even that of a prior execution, are divested. 2 Tidd, 916; Ib. 927; 2 Bac. Abr. 721; Carth. 419, 420. The reason *given in the last

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case is applicable and conclusive. But the act of 1700 provides expressly, that after the sheriff's sale, the lands, &c., "shall be and remain a free and clear estate to the purchaser,

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his heirs and assigns forever, as fully and amply as ever they were to the debtor."

The act of 1705 introduced a system of proceeding with respect to mortgages entirely new. It treats them not as conveyances of the land, but as liens or incumbrances merely, and gives a remedy to the mortgagee for the recovery, not of the land itself, but of the debt, by a sale of the land under a *levari facias*, by virtue of which it is to be sold, "free from all other incumbrances." That a mortgage has been treated by the courts as a security merely, is shown by the cases of *Dorow v. Kelly*, 1 Dall. 142; *Wentz v. Dehaven*, 1 Serg. & Rawle, 317; *Semple v. Burd*, 7 Serg. & Rawle, 290; *Schuylkill Nav. Co. v. Thornburn*, 7 Serg. & Rawle, 419. In *Scott v. Croasdale*, 1 Yeates, 75, an early case, it was decided that a mortgage by the husband alone in consideration of a precedent debt was sufficient to bar the wife's right of dower. A conveyance of real estate to trustees for the payment of debts, does not of itself affect the wife's right of dower. This shows that a mortgage was not looked upon as a conveyance, and proves the difference between our local regulations and those of England, and other states. If then a mortgage in Pennsylvania be only a security for a debt in the shape of a lien upon the land, the next question is, how such a lien is affected by a judicial sale. Upon principle it would seem, that there could be but one answer to this. The great object of our law of executions is to get satisfaction for the execution creditor, by a sale of the debtor's property for its full value. Sheriff's deeds convey all the title of the defendant but no more. There is no warranty, and the rule of *caveat emptor* fully applies. Hence, they seldom produce as much as private sales. It has been the policy of our law to encourage purchasers. But if they are to buy subject to liens, the price will be materially affected. It is not possible for the purchaser at sheriff's sale to ascertain the incumbrances previously to the purchase, as in the case of a private sale. Continuing liens, therefore, and a full price, are inconsistent. One must give way. The paramount object is full price. The security of the incumbrancer is secondary, but not at all inconsistent. His lien is transferred from the land to the fund, and it will be shown presently, that it is sufficiently attended to. Then, how stand the authorities with respect to incumbrances or liens? In Pennsylvania the principal, and perhaps, only liens upon lands, are, 1. Judgments, 2. Legacies charged upon land, 3. Recognisances, 4. Mechanics' claims, 5. Mortgages.

1. *Judgments*. It was supposed at one time to be doubtful, whether a sale under a younger judgment destroyed the lien of a prior judgment. 3 Griffith's Law Reg. 250, in note, shows

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the opinion of the profession, and the case of the Commonwealth v. Alexander, 14 Serg. & Rawle, 262, settled this point conclusively.

[*117] *2. *Legacies charged upon land.* This is, perhaps, as strong a case as could be put for the incumbrancer, yet in an early case, it was ruled, that the proceeds of a sheriff's sale were to be applied to the discharge of such a legacy. *Nichols v. Postlethwaite*, 2 Dall. 131. And it has since been held after full argument, that the lien is discharged by such sale. *Barnet v. Washebaugh*, 16 Serg. & Rawle, 410.

3. *Recognisances.* The only case under this head is *Gilmore v. The Commonwealth*, 17 Serg. & Rawle, 276, which decided that the purchaser of property sold by order of the Orphans' Court, took it divested of the lien of a recognisance given to secure the distributive shares, and it was said by the court, that there was no difference between a recognisance and a judgment in this respect.

4. *Mechanics' Claims.* A very recent case places these liens on the same footing with the preceding. *Werth v. Werth*, 2 Rawle, 151.

5. *Mortgages.* Having shown, that all other liens are discharged by a judicial sale, I proceed to inquire what has been the current of authority with respect to this. *Evans v. Jones*, (1 Yeates, 172,) cited by Mr. Kane, was not a case of sale, but of property taken at an appraisement on proceedings in partition in the Orphans' Court. The earliest case of sale is *Febiger v. Craighead*, 2 Yeates, 42. The evidence given on the trial at *Nisi Prius*, in Cumberland county, in that case, shows what was the practice as far back as 1793, in that part of the state.*

* Mr. Wharton read the notes of the trial from the MSS. of C. J. Shippen, and has favoured the Reporter with a copy, which is subjoined.

Lessee of Christian Febiger	}	Nisi Prius.
vs. Thomas Craighead.		Cumberland County, 15th May, 1793.

Mr. *Ingersoll*, pro Q. John Glen executed a mortgage to the Loan Office; none of the money secured has been paid. Act of Assembly, Province Laws, 478. Deed shall vest estate in fee in trustees of Loan Office.

Mr. *Duncan*, pro D. John Glen, the mortgagor, was sued by ———, and judgment and execution.

Oct. 1781. John Scott	}	Judgt. and Exn. Vend. exp.
vs. John Glen.		

Nov. 1782. Lands were advertised and sold on these executions to James Davidson.

John Boys v. James Davidson. Judgment, execution, and sale to Boys.
25 March, 1783. Sheriff's deed from Boys to Davis.

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The statement by Mr. Lewis, of the practice of *the state as reported by Yeates, is entitled to great consid- [*118] eration. The next case is *Keen v. Swaine*, 3 Yeates, 561, where the court was divided in opinion, but the weight of authority and experience is obviously with the affirmative of the proposition. The doctrine contended for has received further support and sanction in *Petry v. Beauvarlet*, 1 Binn. 97; *Wall v. Lloyd's Ex'rs*, 1 Serg. & Rawle, 324, 327; *Stackpole v. Glassford*, 16 Serg. & Rawle, 163. We have then the evidence of public officers, and the statements of the most eminent professional men with respect to the practice, and decisions of this court from the earliest times, if not expressly determining the point, yet leading inevitably to this result. Then came the case of *Willard v. Norris*, which has been followed by *M'Lanahan v. Wyant*, 1 Penn. Rep. 112; *Finney v. Commonwealth*, Ib. 240; *Fickes v. Ersick*, 2 Rawle, 166.

Taking then the case of *Willard v. Norris* to be properly adjudicated, it remains to be seen, if the present differs from it in any essential feature, which calls for a different determination. 1. It is said, that the money was not due, and that the plaintiffs could not be compelled to accept it from the mortgagee. On principle this ought not to make any difference. The mischiefs are the same in sheriff's sales. It cannot be said to violate the obligation of a contract to offer money to a creditor before it is due. In bankruptcy this is done, *Cooper's Bank. Law*, 191-2.

24 Nov. 1784. Sheriff Postlethwaite to Craighead as property of Davis.

Verdict agreed to be taken for plaintiff upon the point reserved, whether when land is sold under a judgment, and no notice given to the purchaser of a prior mortgage, the purchaser shall hold the land, discharged of the mortgage.

Davie Hoge was formerly sheriff of Cumberland county. The usage has been, for thirty years, when the sheriff knew of a mortgage, he sold subject to the mortgage, but when the sheriff had no such knowledge, and there was no mortgage recorded in the county, he sold absolutely, and paid off judgments and mortgages according to their priority. It was considered that when the land was sold absolutely, it discharged all former incumbrances as to the purchaser, and the sheriff looked to the payment of judgments according to their order.

Timothy Hartley, Esq. It has been the practice, that when a mortgage was known at the time of sale of land under a judgment, the land was generally sold subject to the mortgage, and then the purchaser was to look to the discharge of the mortgage. If the land was sold absolutely, without mentioning a mortgage, it was the business of the sheriff to discharge incumbrances, according to priority, and the purchaser was not to look to it.

Mr. C. Smith. It has been the general idea, that it was indifferent to the purchaser whether there were any prior incumbrances or not; that it was the sheriff's duty to see to the discharge of incumbrances, according to their priority.

Jno. Postlethwaite, former sheriff, has sold land subject to a mortgage, in which case the mortgage money was to be first paid.

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There is no difference between a mortgage and judgment in this point. In *Commonwealth v. Alexander*, 14 Serg. & Rawle, 257, the judgment was not payable at the time of sale. But it is not necessary that the money should be paid to the creditor *in invitum*. In *Commonwealth v. Alexander*, C. J. Tilghman says, that the money may be brought into court, and kept until the creditor is entitled to receive it. Why may not the court invest it? In *Barnet v. Washebaugh*, this objection was made, but disregarded. At all events part of this land was sold in 1825, four years after the mortgage became due, and part remains unsold. 2. It was argued, that as only part of the land was sold here, as it was not described conformably with the mortgage, nor sold as the property of the mortgagor, the rule in *Willard v. Norris* ought not to be applied. Now if the circumstance that part only of the land was sold at each sale, is to have any weight, the true question would seem to be, if there was enough raised to pay off the mortgage. Now the first sale produced three times as much as the mortgage, the second more than [*119] enough and so on. Then as to description, 1. It was described sufficiently as to locality. 2d. Handbills were placed on the houses. 3d. Advertisements were published in the newspapers. The same objection has been made and overruled in the case of judgments and legacies charged on land. 14 Serg. & Rawle, 257, 259; 16 Serg. & Rawle, 410. It is said also that the plaintiffs have lost their remedy against the sheriff. If so, then, laches cannot affect this case. It appears that interest was stopped so far back as 1821. This ought to have put them on inquiry. In 1823 they obtained judgment, and ought to have proceeded against the sheriff. However this may be, it is settled, that the purchaser at sheriff's sale is not bound to see to the application of the purchase-money. *Bank of Pennsylvania v. Winger*, 1 Rawle, 302; *Finney v. Commonwealth*, 1 Penn. Rep. 240-1, per Gibson, C. J. As to the act of 1830, it is merely remedial, not declaratory.

Mr. Price and Mr. Tilghman followed on the same side.

Mr. J. Sergeant, for the plaintiffs, contended, that whatever might be the decision in *Willard v. Norris*, it left open two questions in the present case, 1. Does the sheriff's sale affect a mortgage not yet due? 2. Does it affect the rights of the mortgagee further than to take off the lien from the land sold?

1. No case, no dictum, no argument has been presented to establish the affirmative of the first question. The mortgage security has been one specially regarded by the legislature: it is placed on the same footing with the public debt, as a mode of investment. And it has always been understood to have the

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same advantage over legal incumbrances, that it cannot be paid off before the stipulated day. It is not merely to have the same effect as a judgment. Both may be securities; but one only as a lien by contract between the parties. It is a good contract, made for a sufficient consideration, by competent parties; and none but the parties have an interest in it: a contract of pledge, not necessarily as security for the payment of money; it may be for indemnity, it may be for the performance of covenants. Can such a contract be set aside, or the rights of the parties varied, for the purpose of aiding the conflicting interests of others? Can the time, which was an essential element of the contract, part of the consideration moving between the parties, be disregarded? Till the time of payment arrives, the mortgage is a conveyance, and the mortgagee may claim possession: when it has arrived, and only then, the mortgagor is entitled to demand a removal of the incumbrance on payment of the debt. Judgments are general liens; but they are subject to contingencies of various sorts, *Thellusson v. Smith*, 2 Wheat. 396, and among them the contingency of legislative intervention. The legislature may properly enough legislate respecting a remedy, and a judgment is nothing more; but a mortgage is a contract, which they cannot touch. One is a security for money, the other, process for the recovery of a debt. A law was necessary to make lands *liable for the payment of judgments, to [*120] enable a sheriff to sell them under a judgment. But no law made land liable for a mortgage; it was made liable by the parties. The sheriff on an execution sells the title, the interest of the defendant. What the defendant could have done, the law will do: it will pay off mortgages that are payable by the terms of the contract of mortgage; but it cannot pay off others. 2. Does a sale of part discharge the rest? As between mortgagor and mortgagee, this is a mere destruction of their contract, and would confessedly be unjust: the assignee of the mortgagor can only stand in the place of his assignor, and can claim no other rights.

Mr. *J. R. Ingersoll*, for the defendants, contended, that the plaintiffs suffered their claim to sleep so long as to constitute an equity in favour of the tenants. *Moore v. Cable*, 1 Johns. Ch. 385; *Demarest v. Wynkoop*, 3 Johns. Ch. 128; 9 Wheat. 489; 4 Johns. Ch. 551. In a conflict of equal equities the legal title prevails. 1 Fonblan. 320, 350; 2 Fonbl. 486, and note. As to the part not sold, the defendant, Stewart, has had possession fifteen years and a half; no claim made against him, and no intimation of an existing incumbrance. 1 Pow. 103; 2 Dick. 725; 2 Bro. Ch. C. 431; 7 Ves. 150; *Matthews on Pr. Ev.* 373;

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Finch, 250; 1 Ch. R. 59. In *Taylor v. Potter*, 7 Mass. Rep. 355, it was decided, that where mortgaged premises had been conveyed to different persons, and one paid the mortgage debt, the mortgage was thereby discharged as to both. A mortgage wants all the dignity of a conveyance: it is not subject as such to the provisions of the statute of frauds, 11 Johns. 534: it may be created, and may be assigned by delivery: on the death of the mortgagor it goes to the executor and not to the heir: a wife is not required to join in it: it may be extinguished without release or other formality. But it is supposed to be above legal control, because it is a contract: and are not all contracts made subject to the existing laws? A contract is vitiated if it becomes illegal even after it is made. 2 W. C. C. R. 276; 12 Wheat. 213. Considerations of public policy may even sweep away a contract altogether: such are the cases of the entry upon lands, and the occupation of them by the public, for roads and bridges, &c. In cases like the present, the money is substituted for the land, and the plaintiffs must look to the proceeds, or lose their whole claim. Mr. Ingersoll cited in the course of his argument the following authorities, besides those already referred to. 1 Peters' R. 443; Powell, 907-8, 144; Chitty's Forms, 176; Ambl. 652; 2 Sch. & Lefr. 425; 2 Com. Dig. 708; Mort. 4, a. 9; 1 Rawle, 270; 3 W. C. C. R. 276; 1 Vern. 455; 10 Mod. 488; Ambl. 614; 3 Co. 14; 1 P. Wms. 505; 3 P. Wms. 98, 402; 1 Johns. Ch. 425; 4 Johns. Ch. 334; 1 Yeates, 189; 10 Serg. & Rawle, 450.

Mr. *Chauncey*, for the plaintiffs.—The special verdict presents no actual payment of the mortgage; but it is contended, that there has been a legal exoneration of the land, effected by sheriff's sale of part of the premises before the mortgage was [*121] due, and of a small part afterwards. The questions then are, 1st, Whether by these sales there is a legal exoneration of the land sold: 2d. Whether there is such an exoneration of the land not sold. These make it necessary to inquire, 1st. What is the legal right of a mortgagee, and what is the character of its security? 2d. What is the effect of a sheriff's sale on that right and security? The defendants affirm, that there has been such a legal exoneration, and argue, 1st, That a mortgage is a mere legal incumbrance on lands in Pennsylvania: 2d. That a sale by the sheriff is a judicial sale: 3d. That a judicial sale exonerates from all incumbrances. These propositions are all of them essential to the defence.

It is a little curious, that the profession should be engaged in settling at this time of day, the legal character of a mortgage.

The learned state the origin of this species of contract to have

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been with the Jews; from them to have been derived to the Greeks and the Romans, and by us, to have been borrowed from the civil law. In its origin and through its progress, it has been a contract of pledge, of specific hypothecation; and when adopted into the common law, it was used as to land, by the conveyance of the estate on condition. This has been the form of the contract from its origin to the present hour. It is a conveyance of the estate on condition. In England, it was at first in fee simple; afterwards for a term of years and latterly in fee simple again. The difference between a mortgage of lands and a pawn of goods is, that by the terms of the contract, the mortgagee has, after the condition forfeited, an absolute interest in the thing mortgaged, but the pawnee has the right only to hold the goods for his security. Hence it is said, a mortgage is a pledge and more. But in England, equity relieves after the condition is forfeited, and the consequence is, that this power existing in equity, the estate does not become absolute, always remains conditional, and the mortgage becomes in effect a security. This was the character of the mortgage, when it came with our ancestors to this province. It so continues to be in England to the present day, and has not varied here in one essential particular.

It could only be changed by the legislature, but they have been unwilling to vary its character or obligations. The act of 1705, sect. 6, 7, and 8, Purd. 265, was only intended to give to mortgagees a more speedy and effectual remedy: it was for the benefit of the mortgagee, and not to limit or impair his security. *Smith v. Shuler*, 12 Serg. & Rawle, 240.

Such being the history of the mortgage contract; it never having been restricted by legislative intervention, why should it not like every other contract, be construed according to the plain intent of the parties?

The answer is, that the law of this contract is essentially different in Pennsylvania from what it is in England, and the other states of this country; and the points of difference are supposed to have their origin in the act of 1705. This act, however, as we have shown, was purely remedial, and has been [*122] always so held, and the real differences have relation only to the remedy, 1st. A subsequent debt cannot be tacked. *Dorow v. Kelly*, 1 Dall. 142. But this even in England is not by virtue of the contract: and the change with us is only because our remedy is different, and the act of 1705, which gives it, directs the manner in which the surplus shall be applied. 2d. It precludes the right of dower. *Scott v. Croasdale*, 1 Yeates, 75. But this is because, by the act of 1705, the proceeds of the land are made applicable to the payment of debts, as fully and absolutely, when sold under a *levari* as under a different

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execution. This decision secures to the mortgagee the fullest benefit from the legislative remedy: it does not affect his contract, much less impair his rights. 3d. It is said, that in Pennsylvania a mortgage is no more than a security for a debt. True; and it is so in England, and in New York, and in all the states, where the mortgage remains as originally derived from the mother country. But it is everywhere a security according to the contract. Where the contract is the same, the security does not differ. 1 Co. Powell, 4 n. B; 1 Coote, 1; 3 Johns. Ch. 145, compared with 1 Serg. & Rawle, 317; 7 Serg. & Rawle, 411; 11 Serg. & Rawle, 222; 1 Rawle, 325. These authorities show, that elsewhere as here, a mortgage is neither more nor less than a security effected by a pledge of lands. In full accordance with them is the case of *Rankin v. Scott*, 12 Wheat. 177. Again; it is contended, that the law of Pennsylvania, making lands as chattels for the payment of debts, has so changed this security as that a sale discharges from it. But it does not appear by the act either of 1700 or 1705, that such an assimilation of lands and chattels was intended; and even admitting the analogy, it is not true that a sale of chattels, which have been lawfully pawned by the contract of the owner, will free them from the pledge. These acts define the estate of the purchaser to be that of the defendant. 9 Serg. & Rawle, 162; 11 Serg. & Rawle, 138. No other acts are referred to. But on the other hand, the whole course of legislation has recognised the character of the mortgage contract, for which we contend. Recording Act of 1715, sect. 8, *Purd.* 163; 23 Sept. 1783, s. 4; 28 Mar. 1820; 31 Mar. 1823, s. 2. And when the legislature has undertaken to legislate on analogous subjects, it has left this untouched as being a contract over which it had no power. Act 19 April, 1794, s. 14, 19, 20; 18 Feb. 1824; 4 April, 1797; 4 April, 1798. If judgments and mortgages were equally within the power of the legislature, why did they limit the lien of one and not the other? But the act of 6 April, 1830, clearly shows, what has been the general understanding of the legislature. There are many distinctions between the rights of judgment and mortgage creditors. 1st. The mortgagee may recover in ejectment, for he has a right to the possession of the thing pledged. *Lessee of Simpson v. Ammons*, 1 Binn. 175; *Smith v. Shuler*, 12 Serg. & Rawle, 240. 2d. A mortgage severs a joint-tenancy, 1 Binn. 175, for it is a conditional alienation. 3d. A sale by [123] the Orphans' Court does not affect it. Act 19 April, 1794, s. 20, 21; 4 Dall. 450; 17 Serg. & Rawle, 278. The act cleared from debts, not from contracts. 4th. The priority of right of payment of the United States overreaches a judgment not a mortgage. *Thellusson v. Smith*, 2 Wheat. 396;

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United States v. Hooe, 3 Cranch. 90. 5th. The mortgage creditor is a purchaser within the statute of Elizabeth. Lancaster v. Dolan, 1 Rawle, 244, and the mortgage is a conditional sale. Ib. 248. How then can it be contended, that a mortgage is a security only as a judgment is, and that it has become liable to all the incidents of a merely legal incumbrance? It was not so originally: it has not been so modified by the legislature: what other power can so modify it? Who has imparted this efficacy to the arguments of counsel, or the doubts, or the *dicta* of learned judges? A mortgage is a contract whose validity and effect can only be changed by the parties to it. The legislature itself can only affect it prospectively.

It is a mistake to suppose that before the case of Willard v. Norris, the principle contended for by the defendants, was ever decided to be law, either directly or indirectly. The cases cited by Judge Tod, so far as they relate to the practice in this district, have been entirely misapprehended; and those which directly relate to the question, do not decide it, but rather avoid a decision of it. 4 Serg. & Rawle, 535; 14 Serg. & Rawle, 263; 4 Yeates, 308. In 3 Yeates, 561, Keen v. Swaine, Mr. Sergeant, who argued the case, informs me, that there were affidavits to show that the prior mortgagee had assented to the sale. As to the decisions which are supposed to bear indirectly on the question, those regarding judgments, recognisances and mechanics' liens, they are all of them cases of legal incumbrances, not of contracts, and are subject of course to the same legislative will, which gives them existence. The only case regarding legacies charged on lands, until Barnet v. Washebaugh, which is only a branch from the same stock as Willard v. Norris, was Nichols v. Postlethwaite, 2 Dall. 131. This, however, only decided, that where legacies were charged, the legatee had a right to claim payment from the sheriff's sale; not that if the land had sold for half the amount charged, the purchaser would have taken clear of the charge: yet to this extent it is carried, when it is cited as deciding Barnet v. Washebaugh. Besides, a charge on lands by will, and a contract of mortgage may well be distinguished. But it may be said, that the contract must be construed with reference to the existing law. True; but we have shown what the law was; we find no written law to change it, and as for unwritten law, the special verdict finds no custom, nor could such a custom change the general law.

The second position of the opposite argument is, that a sale by the sheriff is a judicial sale. I understand by a judicial sale, a sale by a court, of property within its jurisdiction, in its own hands. Such are sales by the Court of Chancery, by Admiralty courts under proceedings *in rem*, and by Orphans' Courts when

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the *res* is made subject to them: In these cases, the proceeds [*124] are always brought into court in *lieu of the thing sold, and always disposed of by the court. This it is, which is the discriminating feature of a judicial sale, from which it derives its dignity, and superior effect. The term is, I submit, misapplied, when it is used in reference to the act of a sheriff, under the instructions of an attorney, where the proceeds of sale are to be distributed by the sheriff himself, and the court takes no notice of the whole proceeding, unless specially called to do so by litigation in reference to it. After a very careful examination, I have not been able to find, that the expression was ever so applied except recently in Pennsylvania, and in connection with the doctrine in question.

The third position is, that a judicial sale exonerates from all incumbrances. So far as this relates to incumbrances by operation of law, this may be true; but there is no warrant in any of the books for the general proposition. It is not true in the case of a proper judicial sale by the Orphans' Court. *Moliere's Lessee v. Noe*, 4 Dall. 450. No statute, no judicial *dictum* has gone to this extent. Surely it cannot release from the obligation of a contract. Can it divest a contract of lease even for a contingent term? How then can it vary the effect of a conveyance on condition, a pledge, a mortgage? How can it change the stipulated time of payment? Judgments are sometimes conventional securities, and may then stand as mortgages do; a creditor by mortgage, who has also a warrant for a judgment, may perhaps, by entering a judgment on his bond, merge his peculiar rights under the mortgage; but ordinary judgments may be paid off at any time, for the *debitum* is *in presenti*, and absolutely payable. In bankruptcy and insolvency, by positive enactment, a creditor is allowed to receive before the time; but in neither case is a pledge taken away. Mortgages are preserved, though judgments are not. *Eden*, 269.

But expediency is referred to: expediency cannot vary a contract legally entered into: but expediency invites to the opposite doctrine. The sheriff, upon whom is to be fixed the necessity of an interminable and unsatisfactory search; the mortgage creditor, who from the day of his loan, must incessantly be on the watch for sales of his premises, he knows not against whom, nor when to occur, nor how to be disguised in the description; the debtor, who is to be deprived of the means of borrowing on the best terms by a tender of the best security; all these will unite in depreciating this new expediency. The speculator at sheriff's sales is the individual, who will most approve it.

What is it proposed to hold discharged? Not the debt: that still remains. *Bank of Penn. v. Winger*, 1 Rawle, 302. We

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are then entitled to claim a sale under our *levari* at least of the parts which have never passed through the sheriff's hands. The debt may still be collected there. There can be no contribution claimed as against the mortgage creditor. Our incumbrance was on the record, and the premises were bought by the terre tenants with legal notice of the fact.

*Mr. Wharton had leave to rejoin in consequence of [*125] the course of Mr. Chauncey's argument.

The act of 1715, he said, applied to absolute deeds: The act of 1794 speaks of debts secured by mortgage, judgment, &c., in the same sentence. The act of 1822 which gives the writ of estrepement of waste to a mortgagee, gives it also to the judgment creditor; so that no valid argument can be drawn from the act. The acts of 1820 and 1821 (Purd. 172, 174.) call a mortgage a lien. How can a mortgagee have a lien, and the estate at the same time? This would be a legal solecism. 1 Peter's Rep. 426, Sup. Ct. It was said that a mortgagee has the estate, 1. Because he can maintain ejectment. If this be the reason, the action ought to be by the heir, not by the administrator, as it is settled it must be. But ejectment will lie in many other cases where there is only a lien. *Gause v. Wiley*, 4 Serg. & Rawle, 528. Per Yeates, *J. Galbraith v. Fenton*, 3 Serg. & Rawle, 861. Per Tilghman, C. J. 2d. It is said, that a mortgage is a conveyance, because it severs a joint-tenancy. But so does an extent in England. *Bingham on Execution*, 104. Yet our act of assembly recognises the discharge of an extent by a sale under a younger execution. 3. It is said, that a mortgagee is a purchaser under the statute of Elizabeth. So is a judgment creditor under the act of 1798, *Bank of N. A. v. Fitzsimons*, 3 Binn. 358. But the meaning is, that he is looked upon as such for certain purposes. The case of *Wilcocks v. Waln*, was decided on the authority of *Thellusson v. Smith*, which has been overruled in the case of *Conrad v. Atlantic Ins. Co.*, 1 Peters, 440. The position, that the purchaser is bound to look to the application of the purchase-money, is at variance with principle and the authorities. *Scott v. Greenough*, 7 Serg. & Rawle, 199. *Negley v. Stewart*, 10 Serg. & Rawle, 207; *Bank of Penn. v. Winger*, 1 Rawle, 302; *Wortman v. Conyngham*, 1 Peters' C. C. Rep. 241, 244; *Stable v. Spohn*, 8 Serg. & Rawle, 327. The argument *ab inconvenienti* presses more strongly on the side of the terre tenants. Our system provides ample notice to the mortgagee. Notice is given, 1st, Of the levy, if the execution be upon a judgment: 2. Of the sale by handbill on the property and advertisements. 3d. The sale is in the most public place in the city or county. 4th. If the money be brought into court, the auditor gives notice by public advertisement. What more

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could a court of chancery do? The sheriff gives ample security for any mis-appropriation of the fund. The proceeding is *in rem*, and the mortgagee is bound to look to it. The rule is not universally true, that a prior mortgagee is not bound to take notice of subsequent events. Suppose a street or road should be opened through the property and take away, as is sometimes the case, the principal part of it. His lien would be transferred to the damages given by the jury, which he would be bound to look after. Suppose the land should be submerged, as in the case of *The Schuylkill Nav. Co. v. Thoburn*, (7 Serg. & Rawle, 411.) Suppose the buildings *should be destroyed by fire, and that [*126] they were insured. Public convenience requires that on a judicial sale, prior liens should be divested, and land turned into money, to be applied to those liens, and however particular cases of hardship may be regretted, yet the paramount consideration must prevail. It is believed, however, that with moderate attention on the part of the mortgagee to the situation of the property, there is no risk of loss.

The opinions of the court were delivered by

GIBSON, C. J.—No prudent judge will disregard an opinion of the bar. During an experience of fifteen years in this court, I have seldom found one of its decisions received with disapprobation at the bar, which did not contain something which called for revision. But professional opinion, though valuable as a test of judicial decision, is not infallible. The principle recognised in *Willard v. Norris*, was viewed in a particular part of the state, as a portentous novelty; yet a little consideration would have shown it to be a familiar part of the jurisprudence of every civilized people, whether ancient or modern. Of this, as regards the civil law, which with local modifications, is the code of continental Europe, there is not a doubt. “The principal effect,” says Ferriere, “of an adjudication by decree, (judicial sale,) is a transfer of all the rights of property to the highest bidder, so that he cannot be disturbed by lien creditors, or mortgagees, who have not made resistance to the decree; nor after sale and confirmation, by any claimant of title to any part of the estate levied, because the decree extinguishes (purge) all rights of property, mortgages, incumbrances, and quit rents, (*charges reelles et foncières*) in default of opposition (*Dict. de droit, verbo, Saisie reelle*).” “In the language of the law,” says Denisart, who repeats the same principle, “the word opposition signifies an act by which the execution of a judgment by default is resisted, having for its object the prevention of a sale, till the interests of the opposing party are secured. (*Collect. de jurispr. verbo, opposition.*) The resistance being in substance the defence of a

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terre tenant to a *scire facias*, is to be of course before the decree of confirmation. The sale is strictly judicial, being pursuant to an adjudication, and the proceeds distributed by the court among the creditors according to the priority of their liens or classes. (*Dict. de droit, verbo, ordre.*) Thus we have distinctly announced to us a principle of the civil law, by which not only are liens extinguished, but even an estate paramount to the lien of the seizing creditor is divested. Such also is the rule of the maritime law, which distributes among lien creditors the proceeds of a ship sold by order of the Court of Admiralty on a younger lien; an instance of which is found in the case of the *Madonna*, (6 Robinson, 207.) I certainly do not pretend that the practice of the civil law is to have the force of precedent in the courts here; but, in a case like the present, it seems fair to say, that it goes far to efface the impression of juridical novelty. At the common law there is no judicial sale of lands, and of course we have *no English authorities directly in point. In chancery [*127] the practice is to pay off incumbrances out of the purchase-money, which appear on the master's report, and no other is paid, only because, as it is said, there is nothing to show the court that there is such an incumbrance. (*Vide* — Stretton, 1 Ves. Jr. 266.) But this exception helps to establish the rule, and demonstrates not only the ability of the court to extinguish incumbrances, but its readiness to do so when judicially informed of their existence. When, however, an incumbrance cannot, for any cause whatever, be satisfied out of the purchase-money, it of course remains there, as it does here, a charge on the land. But in chancery the process of sale is such, as to admit of exceptions that have no place in a sale on execution which requires prompt payment by the purchaser, and deprives him of an opportunity to see to the application of the purchase-money, by reason of which the rule is applicable in all its force, to judicial sales of chattels at the common law. As to these, liens created by the act of the parties, require transmutation of the possession, and as goods taken in execution must be actually seized, the reversionary interest of the owner, so to speak, cannot be levied, and for this reason perhaps it is, that goods pawned cannot be taken in execution before they are redeemed. But conflicting liens are created by delivering conflicting executions to the sheriff; and it is perfectly settled that a sale on a younger execution divests the lien of the older one, which takes, not the goods in the hands of the purchaser, but their price in the hands of the sheriff. Would it not then have been strange, if our progenitors had not applied the rule of the common law to land, when they subjected it to sale on a common law execution as a chattel. They carried the consequences of the principle further

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than is demanded here, and held that a judicial sale divests, without compensation out of the purchase-money, the wife's inchoate estate of dower—an interest in the land certainly as sacred as that of a mortgagee. At the end of a century, in which the most curious legal antiquarian might be challenged to produce an instance of a sale on an older judgment, after there had been a sale on a younger one, the practice of satisfying the older judgments out of the purchase-money, received the sanction of a direct judicial recognition by the court; and as far as I have ever heard, with the most perfect acquiescence of the legislature, the bar, and the people. The rule, therefore, having been incontestibly established, as regards incumbrances generally, it will require decisive arguments to prove a mortgage to be an exception.

This has been attempted on two grounds; the first, that the mortgagee is not an incumbrancer, but the owner of an estate in the land, has been abandoned by one of the eminent counsel, who have argued for the plaintiff. He has thought proper to occupy the second ground, that the lien of a mortgage is created expressly by the act of the parties, while the lien of a judgment is but incidental. Of these in their order.

In form, a mortgage is certainly a conveyance; but it is unquestionably *treated at law here, in the way it is [*128] treated in equity elsewhere, as a bare incumbrance, and the accessory of a debt. As between the parties it is a conveyance, so far as is necessary to enforce it as a security: As regards third persons, the mortgagor is the owner, even of the legal estate. This distinction, which, if attended to, will be found to reconcile the apparently jarring *dicta* of the judges, is as firmly established by the practice and decisions of the courts in Pennsylvania, as any other in the law. If the mortgagee had the title for any other purpose than to afford him a remedy, it would not be easy to account for the absence of all the incidents of his supposed ownership; yet his estate, if such it be, certainly cannot be set up as outstanding to bar an ejectment by the mortgagor, or an action of trespass, or a proceeding to obtain compensation for a privilege under a statutory license; nor is it subject to taxation, or lien by judgment, or sale on execution, or survivorship by reason of joint tenure, or courtesy, or dower. It does not break the descent of the estate, or require a reconveyance to revest the title, or prevent it from vesting in a purchaser, or affect the validity of a second mortgage. In answer to the last remark it has been said, that a second mortgage is always of the equity of redemption, which I admit may be the subject of hypothecation. But what will be said of a third mortgage after the equity of redemption also has been conveyed? Con-

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trary to the professional sentiment here, it would be simply void, unless there be equity of redemption springing from equity of redemption in an infinite series, like certain mathematical quantities, which, though perpetually vanishing, are perpetually in view. Such a mortgage would be incapable of confirmation, even by payment of the preceding ones, unless the vesting of the estate in the last mortgagee were supposed to have awaited that event: a process not at all in unison with our notions of conveyancing. But this qualification of the mortgagee's legal estate, seems to be recognised in some degree, even in England. "A mortgagor in possession," says Mr. Powel, "gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge to him for security of his money; and the original ownership of the land still residing in the mortgagor, subject only to the legal title of the mortgagee, so far as such title is requisite to the end of his security." Law of Mortgages, 221. That the legal effect of the instrument should have been modified by time and circumstances, will not appear incredible to those who are familiar with the change produced by usage in the legal effect of a policy of insurance, which has been fixed, not by the letter, but the course of trade, which, with frequent discussion, repeated decisions, and length of time, has reduced the meaning of a very incoherent instrument, to a reasonable degree of certainty. Marsh. on Ins. 304. Again, by the stat. 7 and 8 W. 3, c. 25, a mortgagor in possession is treated as a freeholder so far as to entitle him to vote for members of parliament. This, being a matter of arbitrary enactment, may be said to prove nothing: it discloses, however, the dawn of a sentiment which has *been carried much further by the courts. In *Martin ex dimiss.* *Weston v. Mowlin*, 2 Burr. 978, it was deter- [*129] mined in the King's Bench, that the interest of the mortgagee does not pass by a devise of land, Lord Mansfield, who delivered the opinion of the court, declaring, that a mortgage is a mere charge; and that the estate of the mortgagee being the same thing as the money due on it, will pass as an accessory of the debt, by a will not executed according to the statute of frauds, or become extinct by parol: and the same judge afterwards pronounced it an affront to common sense to call the mortgagee the owner. Down to the case of *Williams v. Bosanquet*, 1 Brod. & Bingh. 72, which is not authority here, thus stood the law in England; and in the state of New York, where the distinction between equity and law is as scrupulously observed as in any part of the world, it has been explicitly declared in *Hitchcock v. Harrington*, 6 Johns. 290, to be the settled doctrine of their courts of law, that the mortgagor is seized as to

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all persons but the mortgagee; and the principle thus broadly announced, has been carried out in many subsequent cases. "Not only the original severity of the common law," says the distinguished commentator on American law, "treating the mortgagor's interest as resting on the exact performance of a condition, and holding the forfeiture or breach of the condition to be absolute non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed under the more enlarged jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received in their adoption in the courts of law." 4 Kent, 151-2. If such, then, be the progress of equitable principles, in courts purely of common law jurisdiction, what might we not expect it to be in courts which are a forum for the joint administration of law and equity? The principle that the mortgagor is seised as to every one but the mortgagee, was asserted by this court in the *Schuylkill Nav. Company v. Thoburn*, 7 Serg. & Rawle, 411; and in *Rickert v. Madeira*, 1 Rawle, 325, it was applied to the interest of a mortgagee, which was held to be exempt from execution because he had not an estate in the land. In *Scott v. Croasdale*, 1 Yeates, 75, it was determined that dower is barred by a sale on a mortgage executed by the husband without the concurrence of his wife; from which it is clear, that the mortgage was not viewed as the conveyance of an estate, (for the estate of the wife passes only by the joint act of herself and her husband) but as a legal incumbrance, like a judgment on which dower may be divested on the principle that the land is sold as a chattel. These cases, with *Wentz v. Dehaven*, 1 Serg. & Rawle, 319, and *M'Call v. Lenox*, 9 Serg. & Rawle, 302, in which a mortgage was in all essential respects put on a footing with a judgment, very satisfactorily disclose the judicial sentiment of Pennsylvania; to [*130] which *may be added *Blanchard v. Colburn*, 16 Mass. 346, as showing a similar sentiment in Massachusetts. It is supposed, however, that *Simpson's Lessee v. Ammons*, 1 Binn. 175, in which it was held on the authority of *York v. Stone*, 1 Salk. 158, that a mortgage by a joint tenant is an act of severance, looks the other way, inasmuch as it is thought to be incapable of producing that effect without operating as a conveyance. We know how eagerly a pretext is sought to elude the odious incident of survivorship; as for instance the execution of an *elegit* on the joint estate of one of the tenants, which is held to work a severance, *Gilb. on Executions*, 41. Yet tenant by

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elegit has but a chattel. 2 Inst. 396. An inference has been attempted also from *Lancaster v. Dolan*, 1 Rawle, 231, which, it seems to me, it does not warrant. It was held there that a mortgagee is a purchaser within the 27 Eliz., and entitled to all the advantage which the character can give him in a conflict with a volunteer. But that proves nothing which has not already been conceded. The title doubtless passed as far as was necessary to the protection of his security, and so far the mortgagee was a purchaser in the strictest sense of the word. At one time it was doubted whether a judgment creditor is not a purchaser within the true intent of our recording acts, and it has been barely held that he is not; yet no one ever suspected him of being the owner of an estate in the land. As to the other ground of the inference from the position there taken, that a mortgage is a conditional sale, every one the least conversant with the doctrine of powers, knows that in the execution of them, form is substance; and that a mortgage, being in form a conditional sale, may be a valid execution of a power to sell without conveying the estate, to every intent. The case of *Ripple v. Ripple*, 1 Rawle, 386, has also been cited; but it seems scarcely necessary to say, that the nature of the incumbrance there, was such as to preclude it from being deducted from the purchase-money. Finally, it has been determined, that the mortgagee may maintain ejectment against the mortgagor; but that is entirely consistent with the principle conceded at the outset, that the mortgagee is the owner, so far as is necessary to enable him to enforce his security. In fact, the only case in which a contrary sentiment has been intimated, is that of *Moliere's Lessee v. Noe*, 4 Dall. 450, but there the opinion on the particular point to which I allude, was not only an *obiter* one, (for the point did not arise) but that of a bare majority; and it was beside formed at a time when the professional sentiment was in a state of transition. Although now too late to question it in a case like the one supposed, it is hazarding little to say, that if an expression of judicial opinion on it had been delayed a few years, the result would have been different. Besides, the opinion of the chief justice was founded in some degree on a distinct provision of the same act.

So much for judicial decision, by which a mortgage has with a single exception been treated as an incumbrance; and the legislature seems to have acted on the same principle as a fundamental *one. In the act of 1705, by which the mort- [*131] gaged premises are subjected to execution, the mortgagee was treated as an incumbrancer, and not as the owner, even at that early day. As an accessory of the former ownership, the equity of redemption, although originally a creature of

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chancery, was considered to be inherent in the land, even without the existence of a court of equity to protect it; and the estate of the mortgagee, which would, by the terms of the grant, have become absolute by a breach of the condition, continued to be viewed as a contingent one. In truth, the inconvenience of treating the estate as it had stood at law, without a court to give relief on equitable terms, would have been intolerable. Accordingly, the remedy provided was not to enable the mortgagee to foreclose, but to get his money out of the land by a sale or extent, "as in cases of other lands sold or delivered on executions for debts or damages." He was thus put exactly on a footing with a judgment creditor; and it is worthy of notice, that the legislature even then, recognised as applicable to a sale on a mortgage, the principle of judicial sales, subsequently applied in practice to all other cases, by directing that the purchaser hold clear, not only of the equity of redemption, but of all incumbrances whatever; thus disposing of the whole estate at once, instead of the particular interest of the execution creditor. In the act relative to mortgages, passed in 1820, the instrument is treated purely as an incumbrance, its lien being declared to attach, not at the execution of the deed, as it would necessarily have been supposed to do, had it been considered as arising from the vesting of the estate, but from the period of its being entered of record. So, in the acts of 1822 and 1823, the mortgagee is spoken of merely as the holder of a security, and one that may be released in part, or gradually discharged by indorsement of payment, as the instalments become due. These are the earlier and principal acts that seem to bear upon the question. But it is supposed that a different notion is perceptible in the act of 18th of February, 1824, by which guardians and other trustees are authorized to invest the moneys of the trust "in real securities," at such rate of interest as the Orphans' Court may direct; and hence it is supposed that the securities thus spoken of are mortgages; that the legislature deemed it necessary to the purposes of the trust, that the investment should be permanent; and that to protect it from interference by the other creditors, it must have been considered that the mortgagee had an estate in the land. It seems to me this train of suppositions is entirely gratuitous. If the legislature had intended to designate a mortgage, they would have done so specifically instead of making a generic term. Beside, there is no reason to impute an intention to restrain the investment to this species of security, when a bond and warrant, or a redeemable ground rent, or a conveyance in trust with power to sell, would all equally answer the description, and two of them the object supposed to be intended. It cannot be doubted then,

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that the legislature had no view to the point mooted here. At its last session, however, it must be conceded that the legislature *viewed the matter in a light entirely different, and it [†132] has been suggested that a due deference to its opinion requires us to retrace our steps. The act which changed the law laid down in *Willard v. Norris*, was a constitutional exercise of legislative power; and regarding it as furnishing a rule for cases in time to come, it will be executed by this court, in good faith, even to the letter. But we will never consent to attribute judicial authority to a branch of the government, whose province it is to enact the law, and not to administer it; nor surrender the constitutional franchise of the judiciary, by bowing to every intimation of a judicial opinion that may be supposed to proceed from the legislative halls. I, therefore, do not acknowledge the legitimacy of the argument drawn from a supposed intimation of legislative interpretation, that the opinion held by this court in *Willard v. Norris*, was an erroneous one. I admit that a prospective intimation by a course of legislation on the basis of a state of things supposed to exist, is a strong evidence that it does exist, inasmuch as it gives rise to rights founded partly in enactment and partly in usage; but here the existence of the law as settled in *Willard v. Norris*, was taken for granted as the foundation of the act which changed it, and which was a legislative affirmation of the very fact which it is the purpose of the argument to disprove. All other legislative acts, however, are in unison with the judicial sentiment, that a mortgage is purely an incumbrance.

But taking it to be an incumbrance, it is said to differ from a judgment in this, that it is created directly and expressly by the contract, while the lien of the judgment is the effect of the law; and this is the second principal ground of the argument. Admitting for the present this difference to exist, it is not easy to see what objection it furnishes to the application of the general principle. It is said that to discharge the incumbrance against the mortgagee's consent, would impair the obligation of the contract. It is obvious that the argument would not touch the case of a mortgage which is due, inasmuch as payment by the mortgagor or any one in his place as a purchaser of the equity of redemption, would stand with the very letter of the contract. But how would it affect the contract to compel the mortgagee to receive satisfaction even before the day of payment? Even as respects the acts of the legislature, the constitutional inhibition relates only to contracts which exist at the enactment of the law. I believe no one ever doubted the power of the legislature to regulate the obligation of contracts prospectively, or to take it away altogether, as was done some years since, in regard to the

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contracts of certain unchartered banks. The parties contract subject to the provisions of the law which enter into their stipulations, and thus tacitly become a part of their agreement: and when the law requires that a mortgage be subject to payment, in certain circumstances, before the day, it is as much an original condition of the contract as if it had been expressed in terms. But a decision of the judiciary is so far different from an act of [*133] the legislature, that it declares no new law; *and consequently can never operate as an *ex post facto*. It merely recognises a rule so long respected in practice as to authorize a presumption of its having been adopted originally by common consent, and in that aspect it is treated as having been the law from the beginning. Such was the origin and growth of the custom which gives the tenant the way-going crop, and impairs the obligation of the contract resulting from its apparent terms, so far as to give the tenant an interest beyond the expiration of his lease. No well advised judge will claim a right of legislation. Independent of the fact that all legislative power is placed by the constitution elsewhere, (a consideration that ought of itself to be decisive) every usurpation of such a right hitherto has proved to be extremely pernicious in its tendency to impair the public confidence in the stability of judicial decision, and subject the rights of the suitors to the prejudices and caprice of the judges. I take it then, that a judicial decision is not to be taken for an act of legislation; and that if the policy of the law, about which I shall have occasion to speak more particularly, should require the contract of hypothecation to be laid under restriction so far as to expose it to the casualties, that are incident to every other species of incumbrance, the constitution interposes no bar. But is the proposition that the lien is a matter of formal and express stipulation founded in fact? By the terms of the contract, the mortgagee is to have not a lien, but an estate; and that he has a lien and not an estate, is as much the legal effect of the instrument as lien is the legal effect of a judgment. It must be admitted, however, to be the intent of the parties that the contract shall create a lien, because they know that such will be its legal consequence, and they may therefore be said to stipulate with a view to it. But precisely such is the intent of parties who resort not to a mortgage, but to a judgment with stay of execution. In both cases the object is real security, not by stipulating for it in terms as in the case of recognisance; but by performing an act of which it is in the one case and in the other a legal consequence: the difference being that the judgment pledges all the debtor's land, within the county, and the mortgage only the lands described in the deed. For this reason a bond and war-

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rant are thought to be the better security ; insomuch that no creditor in the country accepts a mortgage except the vendor of the land, who is generally content to rely on the security of the estate with which he has parted.

It seems to me, that the preceding remarks dispose of the principal grounds of the argument ; but we have ample evidence that no distinction between mortgages and judgments was ever made in practice. The doubt in the case of an older judgment was, whether anything but the clear resulting interest of the debtor could be sold ; and on the theory of those by whom it was entertained, it is singular that it should have arisen. It was a postulate of that theory, that the interest of the oldest judgment creditor did not pass by the sheriff's deed, and in that view it is clear that he would not be entitled to satisfaction, out of what was paid, not as the price of his interest, but *of that which had become the fund of the younger [*134] judgment creditor by virtue of his lien. To suppose that he might resort to the purchase-money or the land at his pleasure, was an evident inconsistency ; and an admission of his right to take the purchase-money, which seems never to have been doubted, ought at once to have settled the question. The purchase-money could be substituted for the land, and distributed among the lien creditors only on the supposition that the sale had divested their right to everything else. At present, however, our business is with the evidence which we have, of the earlier practice ; and this appears by the manuscript of Mr. Justice Shippen, to have been fully developed in *Febiger's Lessee v. Craighead*, which was tried at Carlisle in 1793. David Hoge, who had been the sheriff of Cumberland county from 1769 to 1772, testified "that the usage had been for thirty years, that when the sheriff knew of a mortgage, he sold subject to it ; but that where he had no such knowledge, and the mortgage was not recorded, he sold absolutely, and paid off judgments and mortgages according to their priority : That it was considered that when the land was sold absolutely, it discharged all former incumbrances as to the purchaser, and that the sheriff looked to the payment of judgments according to their order." Samuel Postlethwaite, who had been the sheriff of the same county from 1783 to 1786, testified "that he had sold land subject to a mortgage, in which case the mortgage-money was to be paid first." This short note of his evidence is evidently imperfect, the meaning being that the mortgage was to be paid first, when a clear title was sold ; and in this aspect his evidence is consistent with that of sheriff Hoge. Now it is vain to question the sheriff's right to prescribe the conditions of the sale : if a practice which, according to the account of it there given, has

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prevailed for seventy years, may not confer it, we have no foundation for many of our most important laws of domestic origin. Mr. Hoge's representation of the practice was at the same time corroborated by the testimony of Colonel Hartley, Mr. Bowie, and Mr. Charles Smith, all professional gentlemen of great experience in one or more of the counties of Lancaster, Berks, Cumberland, York, Franklin, Bedford, Mifflin, Huntingdon, and Northumberland, which then comprised that part of the state which is east of the Alleghany mountains, and west of a line midway between the Susquehanna and Delaware. In addition, when the cause came up in bank, the practice was asserted by Mr. Lewis to be general, and this without contradiction from Mr. Ingersoll, retained on the other side, or from the judges, who undoubtedly had ample opportunity to become acquainted with it on their circuits, in every part of the state. No man was better acquainted with the earlier practice and traditions of the law than Mr. Justice Yeates; and it is easy to discover from *Keene v. Swaine*, 3 Yeates, 561, what he supposed it to have been in the matter before us. In the counties west of the Alleghany mountains, I am informed by my brother Kennedy, whose experience there reaches thirty years back, [*135] that a different impression had been *made on the professional mind by the late President Addison, whose opinions were held in deserved respect; yet no one in that part of the state supposed there was a difference between mortgages and judgments, the supposition being that the sheriff could not in any case sell more than the resulting interest of the debtor. This impression was, however, gradually effaced by the influence of the judges of this court, on the western circuit, and the matter came to be viewed there as it was elsewhere. That it was the practice in the eastern counties to sell clear of mortgages, appears satisfactorily from *Petry v. Beauvarlet*, 1 Binney, 97, in which the sheriff of Bucks was allowed poundage for paying judgments and mortgages. To say that the point was not presented to the court, the matter having passed *sub silentio*, is to say nothing. What we want is the fact that an instance of the practice passed in this city, unchallenged by the debtor, or the younger lien creditors, who are usually as sharp sighted and true to their interests, as any other parties litigant in our courts. Certainly it would not have passed as a thing of course, had it been considered as great a phenomenon then, as it has been since; nor will it do to say, the payment may have been with the assent of the mortgagee; he had no right to assent to an arrangement that would enable him to pocket the money of the younger lien creditors. A pretence of right on his part to take satisfaction out of the land or purchase-

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money at his pleasure, and thus throw the burthen on the purchaser, or younger lien creditors, as his interest or caprice may dictate, would be monstrous; such a right would put him in a situation to make terms that would give him more than his debt. How this pretence, which involves the same inconsistency of opinion that I have already noticed in the case of a prior judgment, came to receive countenance, I know not. The difficulty might have been solved by a simple inquiry into the extent of the interest which passed by the sheriff's deed. The drift of the argument here, has been to prove that a sale on a younger judgment passes, not the estate of the older mortgagee, for that is supposed to be reserved, but the equity of redemption; in other words, the clear interest of the mortgagor which the judgment bound, and which the mortgage did not bind. It is not easy to see then, how the mortgagee could make pretence of right to what did not pass by his deed; and which being the subject of subsequent hypothecation by the debtor, constituted no part of his security. How the interest bound by the mortgage can remain in the land, and at the same time be in the money which has been paid for it, so as to enable the mortgagee to take satisfaction out of the one or the other at his option, is what I am unable to comprehend, and the counsel have not attempted to explain. To give him the benefit of that, would enlarge his security to twice its original extent, and be a gratuity at the expense of the mortgagor and the younger lien creditors. As well might the general creditors of a partnership demand the proceeds of a separate execution of the interest of one of the partners which consists of what may remain after payment of the *joint debts. But however inconsistent with the scope of the argument such a right of election [*136] would be, it is not more so than the modern practice which is said to prevail here. According to this, the sheriff sells, neither subject to, nor altogether free from, prior mortgages, but subject, where less than the amount of the mortgage is bid, to affirmance or disaffirmance of the sale by the mortgagee; according to which the premises are returned sold or unsold, for want of bidders. The uncertainty of result consequent on this, must necessarily have an unfavourable influence in preventing the attendance of purchasers; but the practice admits the very reverse of the plaintiff's argument. It admits, that when a sale is effected, the whole estate, and not the equity of redemption merely, is sold, and that the mortgagee is bound to take satisfaction out of the purchase-money. It may be reasonable that a younger lien creditor should not be at liberty to disturb an older incumbrance, where there is no surplus to be got at; and at one time an idea prevailed in the country, on what authority

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I know not, that the sale might be set aside, if no part of the proceeds were found to reach the execution of the seizing creditor. We give no opinion about that, but it is evident that the same idea has given rise to the practice here, else the mortgagee would be consulted in all cases, whether the proceeds were more than adequate to satisfy his debt or not. But if the land were sold subject to his mortgage, the matter would not depend on his volition, more than it would on that of a stranger; he would be bound to look to the land exclusively, and not take satisfaction in a way to disappoint those who have no fund, but the equity of redemption; and that he may look to the price, proves that his estate has been sold, for undoubtedly he can be compensated for nothing else out of the purchase-money. A practice then, which has prevailed in every part of the state for more than seventy years, probably from the foundation of the province, ought, one would think, to be received as conclusive evidence of the law. It is said that practice, to be available, ought to be preceded by judicial decision. It seems to me, however, that this would be an inversion of the usual process of formation; judicial decision not being in any case a nucleus for the increment of the law, but, as in the case of the tenant's right to the way-going crop, the recognition of it as a thing already established by the custom of the country.

The argument *ab inconvenienti*, did the matter rest in discretion, would be inconceivably strong. I have heard with surprise an expression of regret, that the law had not been so settled originally, as to subject the land in the hands of the purchaser, even to prior judgments. This must surely have been said without consideration. If each lien creditor were separately permitted to care for himself, by selling just what might be sufficient to get his money out of the land, a great part of the estate would go among the retainers of the law. Full costs and poundage on every sale, would be just so much taken out of the pockets of the younger lien creditors, who would have come in for a share, had the land been turned into money, by one [*137] operation *for the benefit of all. Besides, no one would be found willing to purchase except at a prodigious undervalue, with the certainty of being annoyed by a series of executions to enforce the prior liens; and thus the younger lien creditors would be kept at bay: and the same consequence, or one as bad, would result from the sale on the oldest lien. The principle insisted on, is, that a creditor can sell no more than he holds by his lien: on no other hypothesis than that all beyond what is necessary to satisfaction belongs to the debtor, could there be a resulting interest in him to answer subsequent incumbrances. What right then would an older incumbrancer have

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which a younger one has not, to divest the security of any one else farther than may be necessary to produce satisfaction of his debt? The abstract principle fairly carried out would require him to sell an undivided interest to the value of his incumbrance, and to strike it down as soon as enough were obtained to satisfy the debt and costs. This preposterous but necessary consequence of the principle, has been put out of view by the legislature, who foreseeing the inconvenience and confusion that would ensue from selling the estate piecemeal, have invested the purchaser with title to it, as it was held by the debtor. But a most oppressive consequence of the doubt generated by the principle of the argument, and communicated to the public mind by the imperfect report of Febiger's *Lessee v. Craighead*, in the 4th volume of Mr. Dallas' Reports, has been a sacrifice of property to an incredible amount. It is not too much to compute this at ten per cent. on every judicial sale of land that has since been made. Instances are within my knowledge of thirty per cent. on the purchase having been offered in consequence of the purchaser's skill, by those who, at the sale, refused to hazard a dollar on their own. Is it not equally the interest of lien creditors, whether by mortgage or judgment, as well as of the debtor himself, and indeed of all but those who speculate in bargains, that the land should go for its value? The public interest at stake is immense; and even if a temporary hardship from the principle of *Willard v. Norris*, were experienced in a particular quarter, it would be greatly more than counterbalanced by the permanent benefit that would result to the community at large. Public convenience, however, is supposed to require that this species of property be set apart and consecrated to investment by those who may be prevented by absence or other causes from attending to their property. If this consideration were imperative, its requirements might be satisfied by the public stocks, which afford all proper facilities; but even if they did not, there is no species of investment that ought to be so sacred as to control the maxim that the public good is the supreme law. But the inconvenience that would have resulted to mortgage creditors from the decision in *Willard v. Norris*, would have been neither permanent nor great. They would have ceased to invest in lands at a distance; and as to defrauding them by a sham sale at an undervalue, that would have become impracticable the moment it was ascertained that the purchaser was to *have an [*138] unincumbered title. But they would have suffered no more in this respect, or by reason of the apprehended insecurity of the purchase-money in the sheriff's hands, than judgment creditors do at present: and I have heard no complaints by these, of losses from collusive or surreptitious sales by younger

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judgment creditors. Even if there were just ground of apprehension on this score, further precaution might be taken by the courts. Mortgage creditors have certainly not been treated as having peculiar claims to protection in other matters; as in cases of injury to the premises, under the road law, for which the mortgagor receives compensation, without notice to the mortgagee; and I am unable to see why his interests should be preferred to that of every one else in the matter of a judicial sale.

It will be seen that the preceding remarks are intended for a mortgage not due. As between the mortgagee and purchaser, who, as owner of the equity of redemption, stands in the place of the mortgagor, it is impossible to conceive of an objection to a payment which consists with the letter of the contract; and whatever might be the right of the mortgagor or the intermediate lien creditors to demur to the performance of the condition out of the money in the sheriff's hands, it is certain the mortgagee himself could not: but standing in every respect as a judgment creditor, he cannot object to payment even before his debt is due; as has already been determined in the *Commonwealth v. Alexander*, 14 Serg. & Rawle, 257, and intimated in *Barnet v. Washebaugh*, 16 Serg. & Rawle, 410. And this disposes of the general question which a respect for the opinion of counsel who have doubted the soundness of the principle of *Willard v. Norris*, has induced to have re-argued on its original ground. It is unnecessary to say that the result is a firm conviction of its solidity. It remains to inquire how far it affects the plaintiff's lien on the whole, or any part, of the mortgaged premises. As to this, my opinion happens not to coincide with that of the majority; and the judgment of the court on the part of the case will be pronounced by my brother HUSTON. The reasons that weigh with me are these:—

The lot held by Jacob R. Smith, and the two lots held by James Hunter, have been sold, and they are consequently exonerated. According to the principle of the *Bank of Penn. v. Winger*, 1 Rawle, 295, the lien is gone, although as regards whatever went in payment of the mortgagor's creditors, the debt remains a personal charge. The question, then, is, how far the residue of the mortgage debt, deducting what the plaintiff could have received out of the proceeds of those executions, affects the residue of the mortgaged premises. The lot held by the heirs of Charles Stewart, on High street, has not been sold on execution, and the question of its liability depends on principles of contribution among the remaining terre tenants, by which it is well settled, a court of equity will direct the mortgagee to levy his debt in a way to do justice to all, as far as it can be done without prejudice to his security. The facts are, that in 1810,

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the mortgagor conveyed the whole mortgaged premises to Gideon Cox, who, *having conveyed the lots on High street held by Smith, Hunter, and Stewart's heirs, to persons [*139] from whom they derive title, reconveyed the residue in 1816, to the mortgagor. In this residue, then, the mortgagor became seised of his old estate, as if it had not been out of him; and how does the question of contribution stand between him and Mr. Cox, or those who have acquired his equities?

Every loan, though secured by mortgage, creates a personal debt from the borrower, whether there be a bond or covenant for payment or not; and as between the mortgagor and his alienee, the mortgage is but a personal debt, the mortgagor being the principal, and the land only a security. It is otherwise, however, between an alienee and an alienor, who has taken the land by descent or purchase, subject to the charge; in that case the land is the principal debtor. The authorities for this are collected in the notes to *Howel v. Price*, 1 P. Wms. 294, and *Evelyn v. Evelyn*, 2 Wms. 664. It would be strange, therefore, if the mortgagor who stands as principal could demand contribution of his surety for his proper debt. It was satisfactorily shown in *Nailer v. Stanley*, 10 Serg. & Rawle, 450, that he cannot. I shall not stop to inquire whether that case has the support of any English authority. It rests on the authority of decisions more signally entitled to respect than those of any Chancellor since the American Revolution, with the exception perhaps of Lord Eldon; and on the plainest principles of natural equity: I allude to *Clowes v. Dickenson*, 5 Johns. Ch. 235, and *Gill v. Lyon*, 1 Johns. Ch. 447. But I take it, a decision of this court, which, as in *Nailer v. Stanley*, innovates on no plain and settled principle of law, does not require the aid of foreign authority. It is supposed, however, that priority of equity from priority of conveyance, is abolished by the act which prevents a release of part of the mortgaged premises from operating as a release of the whole, further than as regards the proportion of the general charge which the part released was bound to bear. They certainly have not in terms declared what shall be the relative liability of the separate parts; but it is supposed that as they legislated for a particular case, they intended that there should be no other. This assumption appears to me to be evidently gratuitous. The case of most frequent occurrence, is precisely the one that was in the eye of the legislature. It arises whenever the mortgaged premises have been conveyed at the same time, but in separate portions, by the mortgagor, or by his heir or alienee of the whole, at different times; as will be seen by an examination of the authorities to which I have already referred; and it is, therefore, sufficiently common to satisfy the

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whole operation of the law, without imputing to the legislature a design not expressed, to cut through all opposing equities, for the purpose of reducing all the parties to a level. The fact is, the legislature interposed no further than was necessary to guard against the apprehended consequences of releasing a part of the land from the burthen of the mortgage, which in the case of a quit-rent, certainly releases the whole. On the principle of [*140] *Nailer v. Stanley*, then, the *plaintiff can have recourse to the lot of Stewart's heirs, only in the event of the reconveyed portion of the premises being found inadequate to the purposes of satisfaction.

That portion, together with half as much more of the mortgagor's other ground fronting on Thirteenth street, was cut up into lots, and separately conveyed at a subsequent day. Of these, the one now held by the heirs of Stewart, (on Thirteenth street,) and the one held by Dolly and Susan Davis, have since been sold on execution, and they also are exonerated. There remains then to be considered the liability of the two lots held by George Pepper, these having been bought in by him on his own execution for less than the debt. Had he received the proceeds of a sale to a stranger instead of the ground itself, he would have been in the situation of a creditor, who, though paid out of his order, may retain against the party originally entitled, on the principle of *Carson v. M'Farland*, 2 Rawle, 118, where an administrator who had paid a just debt out of its order, was not permitted to recover the money back, on the ground of mistake, from having overestimated the assets. A creditor who has received satisfaction in the usual course, is not bound to refund, because the money cannot be followed except where it has been received *mala fide*. But the distinction between money which, if received *bona fide*, cannot be recovered back for want of privity, and specific property, to which recourse, on the original right of the party, may be had in the hands of whomsoever it is found, is rendered familiar by the case of *Rapeljé v. Emory*, 2 Dall. 54, by which it seems to me, Mr. Pepper's claim to exoneration, would have been frustrated, even had he first paid the purchase-money into court, and taken it out again, having received the sheriff's deed. The legal consequences of the sale could not have been eluded by performing a ceremony that would have left the parties exactly where it found them. Mr. Pepper could not give himself a preference by purchasing under his own execution, for the same reason that a purchaser at an administrator's sale of the assets, cannot set off a debt due him by the decedent in an action for the price, as was determined in *Wolfersberger v. Bucher*, 10 Serg. & Rawle, 10. Then if Mr. Pepper has obtained no pref-

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erence, and the property is found specifically in his hands, it is not easy to see why the plaintiff may not have recourse to it on the ground of its original liability. The reason of the rule in the *Bank of Penn. v. Winger*, is that the money being incapable of pursuit, is irrevocably lost to some one, and consequently to him by whose negligence the loss was occasioned. Where, however, the property is accessible in specie, all loss whatever is avoided, by permitting the party entitled, to have recourse to it on his original right, the parties being, by this means, put on their original footing, and restored to their original title. My opinion, therefore, is that the residue of the mortgage debt, after deducting all that the plaintiff could have received from the proceeds of the parts sold on execution, as their contribution to the general charge, be levied, in the first instance, on the lots of George Pepper, and for *what [*141] may then remain unsatisfied, on the lot on High street, held by the heirs of Charles Stewart.

HUSTON, J.—Accustomed as I have been for some years, to hear everything questioned, whether in politics, morality, divinity or law, yet the discussion in this cause was rather a matter of surprise, for as the main question had been at least four times solemnly decided, I had supposed it might have been at rest. I am not, however, dissatisfied, but pleased, that it had taken place, and will proceed to consider it on the acts of assembly, on the principles of law, on settled practice, and on authority, of our own decisions principally. When William Penn and our ancestors were preparing to leave England, certain general principles were agreed on; among which, one was, that a part of a debtor's lands should be liable to be sold for the payment of the debts, viz.: one-third. Soon after their arrival in this country, one-half of the lands of a debtor was subjected to execution for debt, and in 1700, where no personal property was found, the whole. Although this law is in a great measure superseded by that of 1705, yet it is proper to notice some of its provisions, nay to go back and cite another act, No. XL. of the year 1700, Province Law, page 3. It directs the country courts to appoint three sufficient, honest, and discreet persons, to be appraisers in their respective counties, to value and appraise all such goods and chattels as shall be taken in execution by any process out of said courts, which goods shall not be sold until appraisement made, nor until seven days after, to the end the parties may be present if they see fit; that the sale shall be open and the overplus, if any, returned to the debtor; “and in case the said goods will not sell for so much as the same are appraised and valued to be worth by the appraisers, the creditor shall receive

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them for his pay, according as the same are valued and appraised, returning the overplus as aforesaid." The act for taking lands in execution, is No. XLVIII. of the same session, and found Province Law, pages 4 and 5. It enacts that all lands and houses shall be liable to sale on judgment and execution, where no sufficient personal estate is to be found; makes provision for delay of a year, where the messuage on which the defendant is chiefly seated, is levied on; and provides, that before any lands, houses, or messuages taken in execution be sold, they shall be appraised by twelve honest and discreet men of the neighbourhood, and then it shall be lawful for the sheriff to make sale of, and convey the same under his hand and seal, after which sale and appraisement made as aforesaid, such lands and houses shall be, and remain a free and clear estate to the purchaser or creditor, to whom they are so made over or sold, his heirs and assigns forever, as fully and amply as ever they were to the debtor. Then comes a proviso, that if the appraisement exceeded the debt, the creditor should be bound to take only so much of the land as paid his debt, and not bound to take the whole tract and pay his debtor the overplus. One of the counsel [*142] said, we should *leave out the word ever, and add after the word debtor, "when taken in execution," and to leave out the words free and clear estate altogether; it would then read, that the "lands should remain to the purchaser, his heirs and assigns as fully and amply as they were to the debtor when taken in execution." This, to be sure, would change the whole act as to its effect; it was not expected we should adopt this new reading.

Before leaving this act, I would remark, that the only difference between lands and chattels under the act first read, is, that the appraisement is to be by twelve men in one case, and three in the other, and that a deed is to be made of the lands. The purchaser got each equally clear, and so it would seem, did the creditor if they were delivered to him at appraisement. I doubt whether at this time the idea of a judgment being a lien on lands more than it was on goods, had occurred to the legislature.

A former act on this subject was repealed by the queen in council; and in 1705, by act No. CXVIII. all estates held by sales under it were confirmed. This act speaks of sales under decrees in courts of equity. There was then such a court in the province. The act No. CXXXVIII. of the same year, again provides for the sale of all lands for payment of debts, where no sufficient personal estate was found. Under it and the act of 1700, we have acted ever since. I proceed to notice it particularly, first observing, that until the present, I do not know that this act of assembly has been ever referred to in any of the

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latter discussions of this subject. The first section having provided that all lands and tenements may be sold for payment of debts, the second provides, that it shall not be lawful for any sheriff or other officer to sell any lands or tenements, which shall or may yield yearly rents or profits, beyond all reprises, sufficient within seven years to pay the debts or damages and costs of suit, but that all those lands, tenements, and hereditaments, shall by virtue of the writ or writs of execution, be delivered to the party obtaining the same, until the debt or damages be levied by a reasonable extent in some manner and method, as lands are delivered on writs of *elegit* in England.

If a judgment is not restrained for more than seven years by stay of execution, or a mortgage is due and payable within seven years, they both come within the meaning of the term, reprises. 1 Yeates, 477. We have no reported decision on the subject but this one, to my knowledge, but it was by the Supreme Court. In 1795, M'Kean, Shippen, Yeates, and Smith were the judges. Justice Shippen came to the bar in 1753 or earlier; Yeates about 1760, and Smith about 1770; of M'Kean I cannot speak with certainty, but he had been chief justice nearly twenty years. I would add, that as the idea of a mortgagee recovering on ejectment before the last day of payment, had not been conceived then, perhaps, if an ejectment can be sustained on a mortgage at all, it ought to be taken into view, if any instalment will fall due within the seven years.

*The third section provides, that if the rents will not pay the debt and costs within seven years, or if before [*143] the extent be out, another judgment or judgments be obtained against the said debtor, his heirs, executors, or administrators, which together with what remains due on such extent, cannot all be satisfied within seven years by the rents and profits, the sheriff or officer shall certify this, on the return of such executions, whereupon a writ or writs of *venditioni exponas* shall issue to sell such lands and tenements for and towards the satisfaction of what remains due on such extent, as also towards the satisfaction of all the rest of such debts or damages in manner as is hereinafter directed concerning the sale of other lands.

Several reflections occur on this section. It supposes the land actually delivered to and in possession of the oldest judgment creditor; it supposes one or more judgments to be obtained afterwards, and so little idea had the makers of this law of selling land subject to incumbrances, that on a sale by a subsequent *venditioni exponas*, the land was taken from the first judgment creditor, and vested in the purchaser; and the first judgment paid first out of the proceeds, and the balance to the next judgment or judgments, evidently in the order of priority, for if the

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first had priority of the second, the second would have of the third, and so on. This is as plain as words could make it, unless the legislature meant, that the first judgment should be preferred, but after that priority in time should give no preference; yet there was a time when it was questioned, whether the first judgment should be paid out of the proceeds of a sale on a second, and there was a judge or two who said, it should not, nay, it could not be so paid; this opinion was put down, not because it was contrary to the express words of the law, but on account of uninterrupted usage. The law was not recurred to.

The next observation is, that the satisfaction was to be in manner as is directed thereafter, concerning the sale of other lands; there are two directions thereafter, which I proceed to notice.

The fourth section consists of two parts: The first says, it shall and may be lawful for the sheriff or other officer by a writ of *levari facias*, to take and seize all other lands, tenements, and hereditaments in execution, and thereupon with all convenient speed, either with or without a *venditioni exponas* to make public sale thereof, for the most they will yield, and pay the price or value of the same to the party towards satisfaction of his debt, damages, and costs, and then proceeds to direct the mode of advertising, selling, and making the deed, and acknowledging it for what is sold as has been heretofore used on a sheriff's sale of lands. Then comes a clause in the alternative; if the lands cannot be sold, the officer shall so return, and this shall not make him liable, but a *liberari facias* shall forthwith be awarded, commanding him to deliver to the party such parts of the lands, tenements, and hereditaments as shall satisfy his debt, interest, and costs, according to the valuation of twelve men, to hold to him as his free tenement in satisfaction of his debt, &c., or so [*144] *much as they will satisfy; and if they fall short, he may proceed against the defendant's body, goods, or lands for the residue of his debt; all of which said lands, tenements, and hereditaments so as aforesaid sold or delivered by the sheriff or other officer, shall be held and peaceably enjoyed by the person or persons, or bodies corporate, to whom the same shall be sold or delivered, his or their heirs, successors or assigns as fully and amply, and for such estate and estates, and under such rents and services as he or they for whose debt the same shall be sold or delivered, might, could, or ought to do, at or before the taking thereof in execution.

This section was read by the counsel for the plaintiff, but not much commented on: the last sentence particularly was read. I might content myself by saying, that in no respect has it ever been acted on so far as we know, and therefore might be left out

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of view. There is, however, an apparent incongruity, and only an apparent one, which calls for notice. By the two preceding sections no land could be sold without an inquest, to ascertain whether the rents would, beyond reprises, pay debt, interest, and cost in seven years, or without a *renditioni exponas*. By this, other lands might be sold without either, on *levari facias*. Could a party plaintiff by giving his *precipe* for *levari facias* instead of *feri facias*, evade the former sections? Certainly not. The plain meaning, though not explicitly expressed in the preceding part of the act, contemplated and referred to estates in fee simple, or at least of inheritance, and the other lands mentioned in this section, are lands in which the debtor had not an estate of inheritance, or not in possession, as a remainder or reversion, which might not come into possession for seven years. These have been sold and no inquest is necessary. 1 Yeates, 427. The remaining clause of the section only applies to this kind of estate in lands, what had been enacted as to chattels, by the act first cited, and to all lands by the act of 1700, viz., that when levied on, they should be appraised, and if they could not be sold for the amount of the appraisement, they might be delivered to the plaintiff in discharge of his debt; and whether sold under this section or delivered, they should be held by the purchaser or the creditor under the same rents and services, and for the same estate as the debtor held them at the time of issuing the execution. I shall not stop to inquire whether this section was intended to comprise estates in tail, or for the debtor's own life, or for the life of another, or leasehold interests, or all of them, and if not all, which of them. Rents and services are not incumbrances; all lands granted by the proprietors were subject to rents or services to him and his heirs, and several acts of assembly had settled, that these could not be separated from the lands except by his release; nor shall I inquire, whether on the sale under a judgment and execution, of an estate for life of the debtor, or which the debtor held for the life of another, there was, or is, any lien of judgment or preference of a prior to a subsequent judgment. I mean, whether there would have been such preference; this act seems to settle the matter since its passage. This *section then relating to other matters, and not to the sale of estates of inheritance of lands by *feri facias*, [*145] inquisition, and *renditioni exponas* may be laid out of the question.

The sixth section provides for sales on mortgages in the courts of law, not because there was no court of equity, for I have mentioned a law of the same year which referred to it, but because mortgages had been given for securing the payment of money, and where the mortgagor neglected to pay, rents were so low as to make them no adequate or effectual security for payment of

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money; lands were plenty; money scarce. Wm. Penn, in 1702, had offered a square in this city to his coachman instead of sixteen pounds, his wages, and it had been refused; had offered another for twenty pounds, though situated between Fourth street and the Delaware. There is another reason; the mortgagee in possession is the tenant of the mortgagor to all intents and purposes; he must account for the rents and profits; if he improved the land and increased its yearly value, it was a means of paying himself to be sure, but the improvements inured to the benefit of the mortgagor. As soon as rents and profits paid the mortgagee's debts, the mortgagor could turn him out, to go and clear and improve another wild farm for himself. By this section it was enacted, that on the expiration of one year after the whole money secured by the mortgage was due, the mortgagee might sue out a *scire facias* to be served on the mortgagor to appear in court, and show cause, if any he could, why the mortgaged premises should not be taken in execution, and the defendant might appear and plead satisfaction or payment of part or all the mortgage debt, or any other lawful plea in avoidance of the deed or debt. The act proceeds to give directions, that upon a final judgment, the plaintiff shall have execution by *levari facias* directed to the proper officer, by virtue whereof the mortgaged premises shall be taken in execution and exposed to sale in manner aforesaid, and upon sale conveyed to the purchaser, and the money or price rendered to the mortgagee or creditor. It then proceeds, in case this land cannot be sold, that it may be delivered to the mortgagee or creditor in manner as hereinbefore directed as to other lands, "and when the lands and hereditaments shall be so sold or delivered, as aforesaid, the person or persons, to whom they shall be so sold or delivered, shall and may hold and enjoy the same with their appurtenances, for such estate or estates as they were sold or delivered, clearly discharged, and freed from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagors, their heirs or assigns; and such sale shall be available in law, and the respective vendees, mortgages, or creditors, their heirs and assigns shall hold and enjoy the same freed and discharged as aforesaid; but before such sales be made, notice shall be given in writing in manner and form as is above herein directed concerning the sales of lands upon executions." Then follows a proviso, that if the land sell for more than will satisfy the debts and damages and reasonable costs, then the sheriff or other [*146] officer who made the sale, must *render the overplus to the debtor or defendant; and then, and not before, shall the officer be discharged thereof upon record in the same court

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where he shall make return of his proceedings concerning the sales.

It is possible, that in practice, in the progress of society, and the complicated business of modern times, cases may have occurred which were not foreseen by the framers of this act. It was not then usual to spin a law out to the size of a pamphlet. If the general object and intent of the law was made plain, it was left to the courts to regulate the details of practice, and the application of the principle. I have not learned that in any instance the lands were delivered, at the appraisement of twelve men, to the creditor in satisfaction of his debt, unless for seven years, under the first sections. A difficulty certainly would occur in giving lands in satisfaction of his debt to a younger mortgage, which were bound by a prior mortgage or judgment, and giving them clear of incumbrances too. And it is probable this difficulty caused these provisions to remain a dead letter. There was no difficulty in applying the money.

It has been most perseveringly insisted on in this case, that

1st. The mortgage was a conveyance in substance as well as form: that the mortgagee, to use the unfortunate expression of the late chief justice, had the legal estate in the land.

2d. That the mortgage was a contract which the legislature could not alter.

I shall first consider these under the section just read. Taking the mortgage to be a contract binding according to its terms, or taking it that the mortgagee had the estate in fee simple after the day of payment was passed, the section in question is worse than nonsense. Who ever imagined that a law was necessary to give a man what he already had the legal title to? Or why bring a suit and have a trial, and issue execution, and advertise and make a deed, and acknowledge it in open court, to give a man what was his own before? Or why issue a *liberari facias*, and collect and swear twelve discreet men to decide how much a man should pay to a mortgagor, in order to have liberty to keep what, they say, was his own before? The legislature say it was a security for money, and an inadequate one, and provide for selling it as the property of the debtor. If before that law, the words grant, bargain, and sell, in a mortgage, had passed the fee; if the estate had theretofore become absolute when the day of payment was passed, this act alone would have changed the law; but it was not so; a mortgage did not change the estate though the debt was not paid at the day, or for years after. Then, and yet, this form is used. And so a bond is given for two thousand dollars to be void on payment of one thousand dollars at or before a certain day, otherwise to remain in full force and virtue. Yet no lawyer, no man, no woman, is mistaken as to the effect of

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either of those instruments. They are not what the words [*147] import ; they are what the *law, and the universal understanding of all people, make them. It is strange we should now be told otherwise.

In 1705, then, the mortgage was a security for money ; the legislature call it so. As between the mortgagee and mortgagor, the mortgage was in form a conveyance of the land. In England it was so in a court of law for some purposes, to wit, for giving right to possession ; but the mortgagee in possession had in chancery to account for the rents and profits, and when they had paid his debt, his estate was gone ; so completely so, that if he continued in possession afterwards, he must pay the subsequent rents to the mortgagor. The widow of the mortgagee had not dower ; the mortgaged premises did not go to the heir, but to the executor ; was not real estate ; the mortgage was a debt, or security for a debt ; it was a chattel. The legislature here transferred the power over it to the courts of law ; they treat it as a debt ; the plea to it is payment ; they treat the lands as the property of the mortgagor ; they are to be levied on, advertised and sold as his ; are to be clear, and free from all claim by him, and discharged from all incumbrances done or suffered by him ; and to him the residue of the purchase-money after payment of the debts is to be returned.

What right was given to the purchaser ? By the first section, if sold on a younger judgment, the elder judgments were to be first paid off. By the sixth section, if sold on a mortgage, all incumbrances were to be paid off, for the land was to be held for such estate, as they were sold clearly discharged and freed from all incumbrances made or suffered by the mortgagor. A mortgage, if prior, was an incumbrance and nothing more. If then it was sold, as it might be, on a second mortgage, a prior mortgage must be paid, or it would not be clear of incumbrances. The express case of mortgaged lands being sold on a subsequent judgment is not put in the law ; but it was no stretch to decide them to be on an equal footing ; both were incumbrances ; on executions issued upon both, lands will be sold, and there is nothing pointing to any difference in the title of the purchaser.

It has been much pressed that this law was made for the benefit of the mortgagee. It was so ; but not solely for his benefit ; it gave him a remedy which he had not before, but it also gave to the mortgagor a benefit not his before, the right to the over-plus, after payment of all incumbrances ; and it had regard to other persons, by providing that prior incumbrances should be first paid, and subsequent ones too, before any money was returned to the debtor defendant. In short it turned the land into money, and divided the money among those who had liens

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according to their rights. On what ground could a different construction have been made? There was no instance in the law, in which the law had ever sold either goods or land in which it did not sell it clear of incumbrances. If it was the debtor's before sale, it became the purchaser's after sale, without regard to who got the price paid for it.

*The object of all laws must be to do equal justice to all. A public sale clear of incumbrances would [*148] bring the best price; when that was obtained and paid according to right, neither any creditor nor the debtor was injured.

Every mortgage is accompanied by a bond or note. This bond or note may be sued, and judgment obtained on it. Suppose land sold on execution subject to a mortgage; then it will not bring so much as if sold clear of the mortgage, by the amount of the debt secured by the mortgage; but the mortgagee is not bound to proceed on his mortgage; he may proceed to get, or may have got judgment on his bond, and on it proceed to sell the personal estate of the debtor. No court has, and no court can interfere to prevent him. A court of law cannot, nor a court of equity, unless he is so situated as to be obliged to ask their assistance. A purchaser may then buy subject to the mortgage; may not have to pay that mortgage, and the debtor or his other creditors cannot compel the purchaser to pay the amount of the mortgage, or any part of it, to them. *Lyle v. Ducombe*, 5 Binn. 585; 1 Yeates, 9, 189; 9 Wheat. 500.

A mortgage may be secured by several houses, or tracts of land; it may be due and sued, and judgment on it, but the creditor will not sell. It may be, that sold clear of incumbrances, any one of the houses will pay the mortgage. Another person has a judgment subsequent to the mortgage, and he must get his money; he proceeds to sell; what will the purchaser get? An estate at the will of the mortgagee, and which can be again sold on the mortgage next court—it will not bring a half year's rent. Another is set up and sold, but the mortgage may be levied on that; the mortgagee is not bound to take the first; the second then sells at the same price, and so a third, a fourth, a fifth; five tracts are then sacrificed by this mortgage, and the judgment creditor has hardly got his costs; his debt is but little reduced, and the defendant is ruined. His other creditors, if he has any, or his family, may starve. I will suppose the mortgagee to mean no advantage: he proceeds to sell, and the first property pays his debt: the purchasers of the other four get each a house for nothing.

But suppose the mortgagee and the subsequent judgment creditor to join to plunder a debtor; after all the mortgaged property has been sacrificed as stated, the mortgagee may get

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judgment on his bond, keep it duly revived, and as often as a debtor acquires a little property, take it by *feri facias* or *testatum*, or by debt on his judgment in another state.

Again, suppose the mortgagee will do none of these things; the judgment creditor may get judgment and sell, while the mortgagee is proceeding with all expedition to get his mortgage made a judgment; and the judgment creditor himself purchases all the houses or lands comprised in the mortgage, and has got each of them for a year's rent; he is able to purchase the bond; he then gets four or five times as much property as would have [*149] paid his own debt, and *the mortgage both, if sold in the ordinary way: nay, may use the bond to collect its amount from other property. It seldom happens that a man indebted by mortgage to one man, and judgment to another, has not other creditors; they fare as the debtor does, all goes from them. This matter may be pursued in the mind much farther, and in every way it is calculated to give undue advantages to a few to the ruin of others. Let it not be said no one will do what is here supposed possible. There are in every country in the world, and in every county in this state, men of property who, to get more property, will do anything and everything which will increase their wealth, and not subject them to punishment in the penitentiary.

There is another matter in this section: when a sale is made, the money is to be paid to the mortgagee or creditor; for want of buyers it is to be delivered to the mortgagee or creditor; such sales shall be available in law, and the respective vendees, mortgagees, or creditors, their heirs and assigns, shall hold and enjoy the same, freed and discharged as aforesaid. I know the plaintiffs say, the word creditor means in each case exactly the same as mortgagee, that is, the same person by another designation, an *alias dictus*; if so it is a useless tautology; but when we find that the purchaser is to hold clear of incumbrances, the plain and natural meaning of the word creditor is, prior incumbrancer. The money is to go to the mortgagee, if no creditor has a prior incumbrance; if any one has a prior lien, the money goes to that creditor. The vendee, his heirs and assigns, are to hold the purchased property, freed and discharged as aforesaid. And the last section of the act provides, that if any of said judgments, which do or shall warrant the awarding said writs of execution, whereon any lands have been or shall be sold, shall be reversed for error, none of the lands, tenements, or hereditaments taken in execution and sold, shall be restored, nor the sheriff's sale avoided, but restitution, in such cases shall be made only of the money or price for which such lands had been sold. Nothing could more strongly prove the determination of the

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legislature, that the purchaser should have an indisputable title, than this clause. If the meaning had been that the purchaser took, subject to any prior lien, that his estate could be divested by a sale on any prior judgment or mortgage, this clause was worse than useless; it is a mockery; it is deceptive. By the seventh section, the sheriff is to pay the debts and costs, and then the sheriff is to return the overplus to the debtor. The purchaser has nothing to do with it; he and his heirs and assigns are to have an estate available in law, freed and discharged from incumbrances; not to be affected, though the judgment or proceedings are irregular, erroneous, reversed. Can any one seriously believe all these provisions were unmeaning, nay, a mere trap to catch the purchaser's money and give him no right, or one which could be taken away by any person who had an older incumbrance, and who had not been paid by the sheriff?

Lands had not been subjected to sale, for payment of debts generally, *until they were in this country; but chattels and leasehold interests had; and lands in case of bankruptcy; and on sales directed by the Chancellor. They were by the acts cited made chattels for the payment of debts; to be sure they were not sold in every respect as chattels; more form was prescribed; but was there intended to be, or was there any reason why there should be any difference as to the absolute disposal of the debtor's right and the giving a clear title to the purchaser? I have not been able to discover either. Chattels were first bound from the *teste* of the writ; then from the delivery of the writ to the sheriff. After receiving one writ, the plaintiff in that writ had a lien on the debtor's goods, *i. e.*, a right to be paid his debt out of the proceeds of them when sold. The sheriff, however, did sometimes sell the goods and pay the proceeds to the plaintiff in a subsequent execution. No one has ever yet pretended the plaintiff in the first execution could follow the goods and take them from him who bought them at the sale by the sheriff. A ship may be mortgaged at sea, and all muniments of title fairly given to the mortgagee; on her return she may for other debts be libelled in the Admiralty, or before the mortgagee can take possession, may be levied on in execution. When sold according to law, the prior lien takes the money, whether that lien is seaman's wages, a bottomry bond, or mortgage; and this whether sold by order of the Admiralty, or on the execution. I know of no case where, when once sold by process of a court having jurisdiction, she has been again sold by process of the same court, or of any other court in the same country, for any debt of her former owner.

In case of bankruptcy, after the act of bankruptcy com-

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mitted, an execution may be given to the sheriff, who sells the goods. The sheriff is liable for the price at which the goods sold, which may be recovered by the assignees, but the purchaser of the goods from the sheriff, is safe; but he who purchases goods from the bankrupt himself, at private sale, after bankruptcy, or at least after commission issued, cannot retain the goods. The lands of a bankrupt are sold by the assignees; it must have happened that the assignees in some cases have misapplied or squandered the money produced by such sales; has it ever been attempted to sell the lands over again, from the purchaser?

Formerly, in complicated cases, the chancellor decreed a sale; did he ever decree a sale subject to a judgment or to a mortgage? Of late years I believe there is no instance of a foreclosure where it is alleged the mortgaged property will sell for more than the debt; and instead of a foreclosure, a sale is ordered; and when the money is raised, it goes to judgments or mortgages according to their order. I am not aware that land sold by order of a chancellor, was ever sold subject to a judgment or a mortgage, or was ever held to be subject to one in the hands of the purchaser. But he gives notice to all parties, say the plaintiffs; so does our law, as I shall show, as effectually and generally, in the same way as a chancellor does. It was then to be expected, that from analogy to the law, as it had been understood in *similar cases, as well as from its expressions, and from a regard to general convenience, it would be settled that the purchaser held clear of all incumbrances. Was it so settled from the earliest times to which we can go back? Until since the revolution, we have no reports of the decisions of our courts; but Judges Shippen and M'Kean were at the bar about 1750. They would be acquainted with lawyers and judges of twenty or thirty years standing, and with the usage and decisions, and general understanding as to all matters of constant occurrence, as well from their own observations, as from the conversation of elder lawyers and judges. Our laws had directed that lands of a deceased person should be liable for his debts; whether they were liable in the hands of a person to whom an heir or devisee had sold them, would seem also to have been well settled. The first reported decision on the subject is found in 1 Dall. 481; *Graff v. Smith's administrators*. Judge Shippen, President of the Common Pleas, went at large into the question. He decided they were liable; he says, the hardship on purchasers, may, in particular cases, be very great; where there has been any suspicion of outstanding debts, it has been very usual to make the purchase under an execution. This was in 1789. In 1793, the matter was brought

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before the Supreme Court. 1 Yeates, 238 ; Morris' Lessee v. Smith. It was decided in the same way. M'Kean, Chief Justice, quotes an opinion of Chief Justice Chew before the revolution, in which he says, such has been the constant practice. Shippen, Justice, after referring to his former opinion, says, "While in every province around us, the men of wealth and influence were possessing themselves of large manors, and contriving means, and procuring laws to transmit them to their eldest sons, the people of Pennsylvania gave their conduct and laws a more republican cast, by dividing the lands as well as the personal estate, among all the children of intestates, and by subjecting the lands in the fullest manner to the payment of debts. There was a time within my remembrance when lawyers held, that common recoveries for docking estates tail could not be legally suffered in Pennsylvania, and the first that was suffered will be found in my handwriting when a young student. The practice, however, was not generally adopted until the passing of the act of 1750, which expressly authorized it. As lands by means of entails were before this time and act rendered unalienable, the only way of docking them was by the instrumentality of the very acts of assembly now under consideration, (the acts of 1700 and 1705.) Nothing was more common, and it was every day's practice for lawyers to advise the instituting suits against the executor of testators (perhaps many years after his death) for the sole purpose of taking the entailed lands in execution, and barring the entail. Many lands are now held by these titles. There was but one opinion on the subject. The acts of assembly were taken in the utmost latitude for the purposes of making lands responsible to creditors." He goes on in the same strain ; says, inconveniences are said to have arisen in modern times : That the legislature can alter the [*152] *time of the lien, but it is no reason why a court should overturn a construction, which has prevailed nearly a century.

In 1 Yeates, 75, we find *Scott v. Croasdale*. This case decided, that the dower of a wife was barred by sale on a mortgage executed by the husband alone, after the marriage. The defendant's counsel were stopped by the court, who say this point was too clear to bear an argument. Lands in Pennsylvania by the policy of the legislature were made assets for the payment of debts, and the present case cannot be distinguished from a sale on a judgment *feri facias* and *renditioni exponas* ; and the chief justice says a similar decision was made thirty years ago, when the opinions of several eminent counsel were read concurring with the opinion of the court. This last case did not turn on the fact, that the lands were sold for the payment of the husband's debts solely, but that they were sold by

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process of law. A sale to trustees with power to sell for the payment of debts, and a sale by the trustees and the payment of debts do not discharge the lands from a widow's dower, 2 Yeates, 300.

I am aware, it may be said, that none of these cases are directly to the point, that they do not directly decide, that any of these sales would have discharged a prior mortgage, but they prove what is equivalent, nay stronger. A fine or common recovery in England extinguished all claims, outstanding titles and liens, and vested a clear and indefeasible title according to the intent of the parties: at the time spoken of in the above cases, a sale on an execution was supposed to have the same effect. Each creditor of a deceased had a lien on his lands; a right to recover his debt out of the proceeds of those lands when sold; and each had a right to proceed and sell the lands, but if one of them obtained judgment and sold, the lien of all the others was divested, and the purchaser took the lands clear of all claims.

The lien on the land became a right to the money produced by the sale of it; and so little was the payment of the money to the creditor regarded, so much was he compelled to look to the sheriff, that the sale when made to dock an entail was as much a fiction as the common recovery or fine in England. No matter how long the ancestor had been dead, find a claim against him or fabricate one; find a surviving administrator, or make an administrator *de bonis non*; institute a suit and confess a judgment, and sell the lands and all liens, entails, claims, and even errors in the proceedings were at an end; and the purchaser had an available title, clear of all incumbrances. But the manuscript note of Judge Shippen of the case of Febiger's Lessee v. Craighead, which has been read to us, goes to the very point. Mr. Lewis had stated the practice, and he was not a young lawyer, to a court of old men and great lawyers; the oldest lawyers in the state were examined, and say, (and Shippen there puts down as his knowledge and his opinions,) That the usage had been to sell absolutely and pay all judgments and mortgages: That it was immaterial to the purchaser, whether they were prior to the *one on which

[*153] it was sold or not. The purchaser took clear of both judgments and mortgages, and the sheriff must look to the application of the purchase-money. In 3 Yeates, 561, was an application to set aside a sheriff's sale, because the property had not been sold subject to the mortgage; the sale was not set aside, but several of the judges spoke doubtfully, as to whether the purchaser under a younger judgment, took the lands discharged of a prior mortgage.

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1 Binn. 97. The sheriff returned, that he had applied the money produced by a sale of lands to the payment of several judgments and mortgages, and charged poundage on the money so paid. The court decided, that the sheriff had uniformly been allowed poundage upon the payment of prior judgments and mortgages, and gave it to him in that case. No doubt was suggested as to his being bound so to apply it. In 2 Binn. 146, we find *Bartleton v. Smith*. In that case lands were sold on a judgment. Arrears of a ground rent of sixty dollars per annum were due; it was a ground rent in fee, and it was decided, that all rents due up to the sale must be taken first out of the purchase-money. I have only to notice so much of the case. The owner of the ground rent had a covenant from the tenant to pay, a right to distrain, and to enter in default of payment; he had as much, nay, vastly more right, than any mortgagee. On what ground was the money awarded to him? His right bound the land, and as to rents hereafter to accrue, ran with the land. It was because the purchaser at sheriff's sale is to get the land clear of incumbrances.

2 Dall. 131. *Nichols v. Postlethwaite* had decided, that when the sheriff sold land, on which a legacy was charged, the legacy must be paid on the same principle. 3 Binn. 358, *The Bank of N. A. v. Fitzsimmons*, stated it to be the settled practice, and of long standing, to sell clear of incumbrances. Same point arose in *Young v. Taylor*, 2 Binn. 218, though the same doubts were expressed by some of the judges.

In 4 Serg. & Rawle, 509, we find *Gause v. Wiley*, which may be a proof of Judge Shippen's statement, that sheriff's sales were used formerly to dock entails. Or it may be (for the facts are sparingly stated, and the original record of the sheriff's sale defective) a case in which what was supposed a fee simple, was sold for a debt of the owner. It was decided to be an estate tail, and yet the sale was held valid, on various grounds I acknowledge: it contains, however, some things worthy of notice here. It is distinctly stated, that a devisee whose legacy is charged on land, might bring ejectment and recover the land, and hold till paid, and that such had been the practice. No action on the case, or of debt had been used before that year. I well remember, when a student in 1793, 4, and 5, being so instructed, and the reason of the practice given as in *Gause v. Wiley*; also in page 535, Judge Duncan cites *Nichols v. Postlethwaite*, and says, the charge operates as a judgment, and sheriffs in the sale of lands are bound to take notice of it.

In 7 Serg. & Rawle, *Kauffelt v. Bower*, page 82, Duncan, Justice, says, there is nothing in this state to distinguish a judg-

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[*154] ment from a *mortgage, except that a mortgage is specific, *i. e.* binds particular lands; a judgment is general, *i. e.*, binds all lands in the county.

In the same book, page 286, we find *Semple v. Burd*. This case led to an examination of the nature and effect of a mortgage and a judgment. The case depended on this, was important from the amount of property, and though we have not a report of the argument, was fully and ably argued, and the decision is: a judgment during five years, and longer if duly revived, binds the lands of a debtor as a mortgage does; comes in on a sale by the sheriff, equally with a recorded mortgage; they are paid according to the priority without regard to their quality, and the judge says, the judgment gives the creditor a general lien, the mortgage a specific one. This is the only difference, for a mortgage is but a security for the debt, specific and limited. The judgment is unlimited: the securities are equal.

In 9 *Serg. & Rawle*, 302, *M'Call v. Lenox*, the land was sold on a judgment recovered on the bond, to secure which a second mortgage was given. The sale was general of the house and lot; the price enough to pay the first mortgage and only part of the second; but there it did not occur to the counsel or court, that the money bid must go to the first mortgage and judgment, and the purchaser take subject to the second mortgage. The dispute was on another point not necessary to be mentioned here. The money was appropriated according to what C. J. Tilghman calls an ancient practice, to sell the land for its full value, and appropriate the money to the liens according to their priority. Gibson, Justice, says, the purchase-money although collected on the bond, will be paid to the mortgage as an existing lien, when it happens to be the oldest, just as if the bond and mortgage had been for distinct debts due to different persons. Duncan, Justice, goes fully into the nature of the mortgage and judgment, and the effect of the sale, agreeing as to these matters with all prior decisions.

14 *Serg. & Rawle*, 257, *Comm'th v. Alexander*, was a suit against a sheriff by the commonwealth for the use of Gurney's executors, because, having sold the lands, he did not pay the proceeds to them. F. Gurney obtained a judgment against William Patton on a bond and warrant of attorney, payable on a day posterior to the sheriff's sale hereafter mentioned. This judgment bound many tracts of land. William Patton sold one tract to Maxwell, who become indebted to Fahnestock & Co. A judgment, levy, and sale of this land took place. Alexander, the sheriff, did not pay this money to Gurney's executors, and they brought suit on his official bond. Judge Reed decided, that the sheriff was not liable, and he used most of the argu-

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ments, which we have heard here, and which apply as forcibly to a prior judgment as to a prior mortgage. Tilghman, C. J., says, the judge decided, that the purchaser took the land subject to Gurney's judgment. I cannot assent to this opinion, because the principle on which it is founded, would work the most ruinous injustice, in all cases where the purchaser at sheriff's sale, paid the full value of the land, and is, I think, contrary to ancient practice and express adjudication. I shall *not cite his [*155] whole opinion. He recognises *Burd v. Semple*, "that on a sheriff's sale, liens are paid according to their priority, without regard to their quality." Also *Nichols v. Postlethwaite*, where a legacy charged on the land was paid, and adds, "on the same principle the judgment creditors of the ancestor, had there been any, must have been let in." It is true, he waives deciding as to any case, which may arise between mortgage and judgment creditors. This case makes no distinction between an incumbrance suffered by the present owner, and one by a former holder of the land, or rather is an express opinion, that there was none, and he cites *Nichols v. Postlethwaite* as having gone on that principle, and establishing it.

There is another case to be noticed, 1 Dall. 142, *Dorow v. Kelly*. Originally in England the mortgage was what it appears to be on its face, a conveyance of the land absolutely, and only to be rendered ineffectual by payment on or before the day. So at that time the penalty of a bond was recoverable in a court of law unless payment was made on or before the day. When equity interfered as it did in both cases, it considered the judgment creditor or mortgagee as having each a right at law, and it would not interfere to deprive the mortgagee of this legal right, except upon terms of complete justice, according to their notion, being done. Hence, the mortgagor was required to pay to the mortgagee not only the principal and interest, due on the mortgage, but other debts. It may be safely said, if the law on this subject were now to be settled in that country, it would be settled differently. In the case cited it was attempted to tack certain other debts to a mortgage. The court refused this; which if the mortgagee had the legal estate, could not have been refused. "The act expressly confines the remedy on the mortgage to the recovery of the principal and interest due on the mortgage; and the proceedings under the law show the uniform construction of it." And again, "We might as well refuse to stay proceedings in a suit on a single bill, till a subsequent debt was discharged." This decision has never been questioned until now, and nothing can more clearly negative the idea of a mortgagee having any legal or equitable right beyond his debt and interest.

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Lyle v. Ducomb, 5 Binn. 585, is the case of a prior mortgage, and mechanics' lien for houses built on the mortgaged premises. Of so little importance was it then considered, whether the money was raised by a sale on the mortgage, or an execution on a judgment, that it is not expressly stated in the case. There, however, no question was made whether, if the mortgage was a lien, the money should be paid to the mortgagee; no one thought of the purchaser taking the property subject to the mortgage; yet it was a favourable case for it, as the mechanics' lien was for houses built on the lot, after the mortgage.

There was a part of this state, however, in which, for a time, the law was held otherwise; I mean Judge Addison's district; and Judge Breckenridge repeatedly asserted that the purchaser [*156] took subject *to prior judgments and mortgages; he made no difference. Other judges for a time affected to doubt, but all decisions were one way; all report of practice was one way. The judges I have named were at the bar or on the bench, eighty years ago, and up to this time no one of them, as counsel, brought a case, or as a judge, decided as the plaintiffs contend for. Forty years ago, Shippen said, the legislature might change the law, but courts could not.

Moliere v. Noe, 4 Dall. 450, has been cited as the express opinion of another judge. The point decided by the court in that case is clearly right, to wit, that a sale by an order of the Orphans' Court, discharges lands from the lien of a judgment which bound it in the lifetime of the intestate; but that as to lands bound by judgments in the lifetime of the intestate, the order of lien continues the same after his death, and if duly revived, they are to be paid in the same order as if money was raised in his lifetime; and that it makes no difference in this respect whether the lands are sold on execution, or by order of the court. The XIV. section however does not apply to such a case, but to money raised from personal estate, or lands not bound by any judgment, and only to cases of insolvent estates. Now, as it did not release lands bound by a judgment, from the lien of that judgment, so it does not release lands bound by a mortgage, from the lien of that mortgage; but if it is the oldest lien, it must be paid first out of the proceeds of lands within it, and afterwards comes in as a specialty on personal funds. Such I think was, and is the opinion of every lawyer, and such I know was afterwards the opinion of Chief Justice Tilghman.

This case, and some doubts scattered through our reports, produced the worst effects. Lawyers, speculators, spoke doubtingly, though they had no doubts; purchasers were sometimes frightened off; it was not unusual for a man to buy at a sheriff's sale, know-

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ing well enough that the title was good, but expressing many doubts until the property was knocked down to him; and then to sell within a week with warranty against all claims, for one-third, or one-half more than he paid. This was ruin to debtors and to creditors; it was a disgrace to the administration of justice. The law ought not to be doubted in an every-day occurrence. If every court in the state awarded the money to the oldest lien, whether debt of ancestor, or legacy, or mortgage, or judgment, or mechanics' lien; and no lawyer took a writ of error or appeal, no decision of the Supreme Court could be had on the express point, and our reports could show none; if, however, whenever any matter occurred, our courts gave decisions which could not have been made unless the law was in a certain way, they are pertinent, and as conclusive as an express decision on the point. A construction of a law affecting real estate, adopted immediately after its enactment, sanctioned by courts, acted on by all persons, and according to which, a large portion of landed estate was held, became a rule of property, as binding as if it were a part of the text of the law. No court can change it without unsettling titles for *twenty-one years back, and putting the whole state into confusion. I have endeavoured to show that the construction in question followed the words of the law, or was conformable to its spirit; was adopted before the time of which we have regular reports; has been uniform as to decision; at most doubted, but never in any one case overruled; never questioned for nearly a century; then discussed, as all things are discussed in our day, but still followed. When *Willard v. Norris* came before this court, it was our duty to meet and decide the point; to have evaded it would have been a dereliction of duty; to have decided it otherwise would have been against all principle and all practice, and would have done infinite mischief. A court cannot change the law as to titles for the future, without affecting all the past, which are not protected by the statutes of limitation; but this court felt no disposition to change it. That a case may occur in which those who may neglect their business shall lose, is no reason for changing the law. That one isolated class of the community may believe a change would give them advantages, which at present they have not, is no reason for changing a course of decision, if the change would operate injuriously on another and more unprotected part of the community. The legislature have changed it from the time of the late act. That leaves all past transactions as they were. Time will show the advantages or disadvantages of the change.

But it has been argued, that where the money is not due on the judgment or mortgage, the court has not power to compel

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the creditor to accept of it before the specified day of payment. This is not that case: for the bond and mortgage were payable on or before the — day of — 1821. I will not rely on that however. There are many cases in which a creditor must take money before he could compel the payment of it. Under the laws on domestic attachments, insolvent acts, bankrupt laws, and some others, the assignees pay all debts due, and to become due, and ascertain the amount by calculation. Every creditor by judgment or mortgage has a right to apply to the law to turn land into money, for the purpose of paying his debt. The *Commonwealth v. Alexander*, 14 Serg. & Rawle, 257, has decided that this may and must be done, and that a judgment creditor whose debt is not due must take his money or let it lie in court. A mortgagee must do so too.

If ever the time shall come when bonds or mortgages are made payable at a distant day, and not before, it will be time enough to decide on such a case. A judgment or mortgage payable fifty, or a hundred, or five hundred years hence, and not before, is so like a perpetuity, may be managed through the intervention of trustees, or by and through corporations, in such a way as to enable a man to make a very lasting provision for his family; for a judgment debt or a mortgage cannot be levied on or sold for the debts of the creditor. Legislatures and courts too have prevented perpetuities in landed estates, against the [*158] will of the wealthy, and I guess they will not *permit them in personal estate, the evil and injustice of which will be as great as in land.

The authority of the Supreme Court of the United States has been resorted to, and *Thellusson v. Smith*, 2 Wheat. 396; *Conard v. Atlantic Insurance Co.*, 1 Peters, 386, and 12 Wheaton, 177, have been cited. No man who respects learning and talent, directed by patient industry, can do other than respect that court. It is not possible, however, that it can know the particular enactments of each state, and what is of equal importance, the construction put by usage and time on those enactments, as well as the courts of the several states. Aware of this, they follow the state decisions as to titles, where they know them. The nature and extent of liens on land, are perhaps different in every state in the Union.

A judgment in Pennsylvania gives the owner a right to its amount whenever the land is sold by any legal proceeding, and the right does not depend on, nor is it increased in the smallest degree, by issuing an execution. Private sales by the debtor leave the land subject to a judgment against or mortgage by the seller. Sales by judicial process, no matter from what court, turn it into money, and the liens, whether by judgment or

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mortgage, are paid according to priority; there is no other difference. It never was material, and never was inquired in this state, whether an execution had or had not issued on the first judgment, which though it did not give a right to the land, yet gave a right to the money when the law had turned the land into money. The first judgment creditor applies to the officer who sold, or to the court for it; he sues the officer for it, and recovers it; nay, recovers it from the officer and his sureties, if it has been misapplied. What is said in the above cases proves that I state the law as it has been held, always held, in this state. The decision then, in 12 Wheaton, is directly contrary to our uniform law. I do not understand the idea of Chief Justice Marshall, when he says, "It never has been supposed that a subsequent mortgagee, could, by obtaining and executing a decree for the sale of mortgaged premises, obtain a precedence over a prior mortgage. If such a decree should be made without preserving the rights of the prior mortgagee, the property would remain subject to those rights in the hands of a purchaser." He supposes what cannot happen, and never will. On a sale by a chancellor, so far as I know, all the property is turned into money. What was a lien is paid in cash, and the purchaser who paid the cash, holds the land clear of all incumbrances. I am not aware that on a sale ordered in chancery, the purchaser must look to the application of the money; or ever took subject to any incumbrance, unless the sale was expressed to be made subject to such incumbrance. Before the sale, or before the money is paid out, all those interested have notice; so have they in this state. We are in the daily habit of hearing remarks, as to want of notice here, and the notice in chancery, which are strange. Actual notice is as much prescribed by our laws and usage, and as certainly given, as in any court on earth, where it is *possible to give it. Where parties are out of the jurisdiction of the court, notice is [*159] given to the counsel, or by advertisement, exactly as in chancery. It would seem, that many of our lawyers, having read that a chancellor calls all parties before him, take it literally, and really believe he sends to the East and West Indies, and to the sands of Africa, and snows of Siberia, to the north and to the south poles.

Every man is bound to attend to many things. If lands bound by his mortgage or his judgment are uncultivated, he had better inquire once in two years whether the taxes are paid, or his security may be gone by a sale for taxes. He had better attend to whether other judgments or mortgages are obtained against the same property, or they may be sold without his knowledge. To be sure, on the law, as here settled, there is as much certainty

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as there can be, that it will bring a fair price. There can be no sale without a suit, a judgment, an execution, an inquest, a *venditioni exponas*, and most public advertisements; this is repeated, and very public notice, and as it affects property out of the proceeds of which he is to get the money, is given for his benefit, and he is bound to attend to it. After the sale, the money comes into court; the records are examined; his lien is known; actual notice is given him if within the process of the court; if not, the only possible notice is by advertisement, precisely as in chancery. There are very many things which must be attended to or lost. A merchant must protest his bill, and give notice; a simple contract debt must be sued within six years; a judgment revived within five; a bond and mortgage sued within twenty or twenty-one; an estate in fee simple not neglected twenty-one, and taxes on unseated lands paid within two years, or the land is gone; and there is nobody to give notice of these things. Every man is bound to know and to attend to all that is by law incident to his estate or his rights, whether real or personal, in possession or in action, and must submit to the consequences of negligence. The business of the world cannot stand still, for those who are negligent or distant. After the publication of notice, partition of the lands may be made in the absence of some of the parties; intestate's estates may be divided in the same way, and in both cases, if the property cannot be divided, it will be sold, and the share of the money preserved for those who are absent. Of all wakeful animals, perhaps, your money-lending man is the most vigilant. It occurs one hundred times that securities are unavailing, for want of protest and notice, or by operation of some of the statutes of limitations, for once that property is sold without the actual knowledge of the creditor who has the prior lien. Why should a single instance of the latter kind, if ever one did happen, occasion as much alarm as an earthquake? Why must the business of all the rest of the world be stopped or deranged for one alleged occurrence of this kind? The case of *Willard v. Norris*, was but a three hundred dollar matter, and even there although the Bank of Pennsylvania, or its directors did not hear of the sale, their duly constituted attorney in fact (John Morris, Esq., of Wells-
[*160] borough) was present at it. I conversed *with him about the levy and judgment some months before the sale. The fact is, an ejectment on a title entirely adverse had been brought, and a judgment by default obtained on it; and this, and this only prevented the property from selling for enough to pay the judgment and mortgage both.

But an ejectment can be brought by the mortgagee. This has been decided, and I am sorry for it. It is in the face of the

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spirit of the act of 1705, and of the letter and spirit both of the act of 21 March, 1806, but it proves nothing. Until since 1815, it was usual to bring one for a legacy charged on land against the devisee; and now if land is devised to A. to be sold, and the price given to B., C., and D., and A. does not sell, B., C., and D. can bring ejectment and recover it from him. Nay, by the express direction of the act of 1705, if the rents would pay the debt in seven years, it could not be sold, and the judgment creditor could recover in ejectment, and hold till paid, and had to bring ejectment until the act of 13 April, 1807, directed the sheriff to deliver the possession on the *liberari facias*. The fact is, that ejectments are still resorted to in this state in more cases than are necessary; and were once used in several, which are now abandoned. Either the courts will cease sustaining them on mortgages, in obedience to existing laws, or the legislature must again interfere. Ejectment is seldom used on a mortgage, except for purposes of oppression.

By the act of 2d April, 1822, the mortgagee may release any part of the mortgaged premises to the mortgagor, or his heirs, executors, administrators, or assigns, or any person claiming under him, or them, and may proceed to collect the debt, or demand mentioned in the said mortgage, or so much thereof as remains due from the residue of the mortgaged premises; and the defendant or defendants in such *scire facias* in addition to the pleas under the former acts, may plead, that the balance claimed is greater than, in a just proportion, ought to be levied out of the premises described in such writ; and if he or they confess judgment for what they allege is a just proportion, and the plaintiff will proceed, and does not on the final judgment recover more, the plaintiff shall pay the costs.

I consider, that although the plaintiff in this suit might have demanded his whole money from the proceeds of the first sheriff's sale, and after that a proportion at least from each succeeding one, yet it will be more consonant to justice and equity to consider his neglect to apply in each case as equivalent to a release of the part then sold, and by a liberal construction of this act, as having recourse to the remaining parts of the mortgaged premises for the proportion, which each ought to pay.

I also think the plea allowed by this act, is given not universally, and in every possible case, *e. g.*, if the mortgagor still owns all the lands, and a part is released, he may still be liable to have the whole mortgage collected from the remaining lands; but if he has aliened part or parts of the premises, and the mortgagee, after this, releases *any part, he discharges [*161] the parts sold, and all the parts sold, whether to the first or a subsequent purchaser, from paying more than what a

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jury shall say, is a just proportion between the part sold and the whole mortgaged property of the whole mortgage debt.

It will be observed that I have spoken of mortgages for the payment of a definite sum of money. Those to secure a yearly provision in grain or money, to a person for life, or such cases, were not before the court, and to such my observations do not apply. The same may be said of such incumbrances by will or otherwise. I have said nothing of any such.

I am then of opinion, that all such parts of the mortgaged premises as have been sold on execution, are held by the purchasers discharged from this mortgage, and that the part never sold on execution, remains liable to the plaintiff for its proportion of the amount of the money secured by the mortgage.

It was contended, that this last was exempt from liability, because it was sold first in point of time by Cox, who purchased the whole lots from Wallace the mortgagor. The doctrine of contribution in such case, is an important point in the law in this state. At common law, in England, where the debtor in a judgment or recognisance aliened part of the lands bound, such lands were not taken in execution until a *scire facias* had issued; and if one of the purchasers alleged that other lands liable to execution were in the hands of persons on whom the *scire facias* had not been served, he was bound to plead it, and they were brought in; and as the debt was collected, not by sale of the lands, but from the rents on an extent on *elegit*, each thus contributed at once to the payment of the debt. The debtor himself could not, nor could his heirs or devisees have purchasers brought in; but co-heirs were liable to be brought in, for they held in equal right. So purchasers, though sued merely as terre tenants, could bring in the debtor himself, or his heirs, or other purchasers, even though some of them were in another county. 3 Co. 11; Moore, 429; 2 Ventris, 104, 105. There is not a word in these cases, or any other case I have found, pointing to a difference between successive purchasers, and many to be found which show there is no difference. 5 Viner, title Contribution, pl. 3. If a man be bound in a recognisance and die, then as long as the heir has assets execution shall be against the heir only; but if the heir has no assets, execution shall be on all the terre tenants, and every one shall be contributory to the other; and cites Broke on Fitzherbert, Execution, 139, pl. 6. So where the feoffee of the conusor is in execution, he shall have contribution against every other feoffee of the same conusor; and cites Broke, tit. Suit, pl. 12, and the Year Books. And pl. 13: If the king's tenant aliene to several, severally, and the king distrain the one for the whole, he shall have contribution of the others.

In 2 Saunders, 6, Jeffreson v. Morton and the notes, we find

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the doctrine on this subject somewhat at large. In page 9, Serjeant Williams, after reviewing the authorities, says, the reason of the plea *seems to be, because every tenant of the land is entitled to have contribution, that is, all the lands, [*162] of the consor of the defendant to the judgment, in the hands of the several purchasers, must be extended and equally charged. Therefore, unless all the tenants be warned, the others are not obliged to answer; and he cites many authorities. Although I have not been able to find a distinction between the first and subsequent purchasers from the defendant in the judgment in the old authorities, there are some cases sanctioned by judges of great learning and industry, which make such distinction, and I proceed to notice them.

Cheeseborough v. Millard, 1 Johns. Ch. 409, is the first case of contribution I find in the reports of New York. In that case the parties on one side were purchasers at the sheriff's sale under the same judgment and execution, and probably bought on the same day; no distinction is made between them. They were ordered to contribute to discharge a prior mortgage, in proportion to the real value of their respective purchases, and not in proportion to the price at sheriff's sale. "The object of the principle of contribution," says the chancellor, "is equality in support of a common burden, and the law upon this point is grounded upon great equity."

In the same book, page 426, we find Cooper *et al.* v. Stevens. In this case Cooper sold to Richardson six lots in different towns in New York, and took a mortgage for the price. Richardson sold No. 82 to Stevens.* Afterwards Richardson sold four other lots, and Cooper released them, and took Richardson's bond for their proportion, or what was supposed to be such. Cooper afterwards assigned the mortgage to Hammond, who insisted on collecting the whole amount from the owners of No. 82 and of 72. There was some evidence of parol agreements which the chancellor laid out of the case, and proceeded to decree that the release of the four lots, rateably reduced the power of the owner of the mortgage upon the remaining two lots, inasmuch as it deprived the owners of those two lots of their right of contribution as against the lots so released. Now if the lot first sold by the mortgagor was discharged, the owner of the lot No. 82 would not have been compelled to pay anything: but it is said, "It is a doctrine well established, that when land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion; and equity will preserve this equality by compelling each party to pay its due proportion (3 Co. 14; 3 P. Wms. 98, 99.) I need not go at large into the doctrine; it is perfectly well understood," &c., &c. "Here the

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mortgagee has deprived the owners of lots 82 and 72 of recourse to the other lots, by previously discharging the other lots ; and he ought not then in equity to charge them with a greater burden than they would have been subject to upon the principle of contribution, if no such discharge had been made." And he directed the master to ascertain the value of each lot at the date of the mortgage, and the owners of 82 and 72 to be discharged on payment of the proportion due on those lots, &c.

[*163] *At page 447 of the same book, we find *Gill v. Lyon* and others, and a cross bill. In 1806, Wilson sold a tract of land to Wells, and took a mortgage for the purchase-money, recorded the day of its date. The same year Wells sold part of the land to Lyon and others, and covenanted to indemnify against incumbrances. In 1807, sundry judgments were obtained against Wells, and the residue of the tract was taken in execution, and sold to Gill. Wilson was proceeding to foreclose his mortgage against all the lands, and Gill and Lyon each brought bills in chancery against the other, Gill insisting on contributions against Lyon, and Lyon insisting that Gill should pay off the whole mortgage, and that the proceedings of Wilson should be staid against him. The chancellor says, the mortgage ought justly to be borne by the lands purchased by Gill, if sufficient to satisfy it. The doctrine of contribution does not apply, as between Lyon and the other purchasers from Wells on the one part, and Gill on the other, because their equity is not equal. Lyon and the others purchased for the full value, and under a covenant from Wells against the incumbrances, and Wells had become insolvent. Gill afterwards purchased only the equity of redemption remaining in Wells, and with a full knowledge of the conveyance to Lyon and others, and has no just claim for contribution ; and decreed that what was purchased by Gill should be first sold, and if that did not satisfy the mortgage, then the part purchased by Lyon and others, unless they paid the balance due. This decree seems to turn on the nature of the contracts, and to draw a distinction between a purchaser who knows of an incumbrance, and takes a covenant against it, and one who knows of it, and takes no such covenant, or buys at a sheriff's sale, in which there is no warranty of any kind. Of the soundness of the distinction as a defence against prior incumbrances, or as to contribution between themselves, I doubt. If it exists at all, it must be on the ground that the latter, by implication, must be supposed to have agreed to pay off the incumbrance, in addition to the price given to the seller. It is true the chancellor says, Gill purchased the estate of Wells, and no more, and Wells, if he had extinguished the mortgage, would have had no claim to contribution against his own vendee.

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In 5 Johns. Ch. 235, is the case of *Clowes v. Dickerson*, in which, also, a man owning lands incumbered by mortgages and judgments, sold two lots in Troy, Nos. 241 and 242, to Clowes, and conveyed them by deed, with a clause of warranty against incumbrances. Soon after all the other real estate of that vendor was sold at sheriff's sale, expressly subject to all incumbrances, and purchased by Dickerson and three others jointly. It was shown in proof, that the amount of all incumbrances was known at the sale, and that the property was notoriously worth double the amount bid, and the amount of the incumbrances. Dickerson, instead of paying off the incumbrances, purchased a judgment prior to the sale to Clowes, and by execution on it, sold the two lots of Clowes, and purchased them himself. The bill was to be relieved from this sale; and the chancellor puts it expressly *on the ground that Dickerson was the subsequent purchaser to Clowes, and on that account liable [*164] to pay the prior incumbrances, and not on what I conceive was stronger ground, that he agreed at the time of his purchase, to pay those prior incumbrances. He got the vendor's property at a lower price on that account, and most unjustly attempted to take other property for nothing; for having agreed to pay prior judgments, the moment he bought a prior judgment, it was paid, he being payer and payee.

It is, in terms, also laid down in this case, that chancery would interfere to prevent a judgment creditor from selling lands in the hands of a vendee of the debtor, until he sold all the lands of the debtor, and also from selling lands of a prior purchaser from such debtor, until he had sold all in the hands of subsequent purchasers from the same debtor. Either the general expressions, in this case, are to be taken to apply to the cause trying, or they are contrary to the case of *Cooper v. Stevens*, first cited; to *Hays v. Ward*, in 4 Johns. Ch. and to 7 Johns. Ch. 212, and other cases.

In 4 Johns. Ch. 135, it is said, after an examination of all the cases, the court cannot interfere to prevent a creditor from collecting his debt from him who is the real debtor, or the surety; from him who is primarily or ultimately liable, unless there are some special circumstances to justify its interference. And in 7 Johns. Ch. 212, lands bound by a judgment, were sold in 1813, and other lands afterwards, sold up to 1816. The first purchaser brought a bill, praying that the judgment should, as to him, be cancelled, and declared satisfied; if not, that the premises owned by him should be discharged, on paying a rateable proportion, or that the judgment be assigned to him, so that he may compel the owners of other lands, bound by it to pay a just proportion; and that the judgment creditor be enjoined from

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selling his lands at present All this was refused ; because the other purchasers were not before the court. The judgment was not ordered to be assigned by way of substitution, on payment of it, because no right, or extent, or amount of contribution could be ascertained. Now by *Clowes v. Dickerson*, the last purchase was to be totally taken, and so on backwards until the debt was paid. It is further said, such a direction would only lead to other suits in chancery, by others, on whom the plaintiff might levy the whole, or on an undue proportion of the judgment ; and, finally, that as the defendant, the judgment creditor, had done nothing but prosecute his lawful rights, the bill was dismissed with costs. Surely, then, the previous cases were decided on other grounds, and not on priority of purchase from the debtor ; or the chancellor had changed his opinion.

In *9 Wheaton, 500, Hughes and others v. Edwards*, a man mortgaged sundry lots in Lexington, to secure a debt. He afterwards successively sold the lots, or some of them, and they were highly improved. A bill to foreclose was brought against the mortgagor and the terre tenants. Among other things, they asked an apportionment of the debt rateably among them. It [*165] was decided, a court will not stop *the mortgagee, till the proportion to be paid by the purchasers from the mortgagor is settled. The mortgagee has a right to a foreclosure and sale of all the mortgaged property, whether in possession of the mortgagor, or of those to whom he had sold. If either of the defendants should pay more than his proportion of the debt, according to the relative value of the property he possesses, that is a matter to be settled among themselves ; but it would be idle to force the mortgagee into the delay and expense incident to the settlement of differences between those with whom he has no concern. The conveyances to them by the mortgagor, are void as to the mortgagee, against whom they have no right, except that of redeeming, on payment of the mortgage debt and interest. It did not occur to the counsel or the court that the first who purchased, was safe until the lots of the after purchasers were sold ; or, rather, the court decided the law was not so ; and that they could not interfere, to order the sales to be effected, so as to produce a greater burthen on the last, than on the first who purchased from the mortgagor.

I would here leave this part of the subject, but *Nailer v. Stanley, 10 Serg. & Rawle, 450*, has been cited, and relied on ; and to be sure, the judge who delivered the opinion of the court, after deciding that the form of the action was wrong, cites and approves of the cases of *Gill v. Lyon*, and *Clowes v. Dickerson*, above noticed. I would observe this point had not been argued ;

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no cases had been cited; the industry of the judge found these two. I shall not, in this case, attempt a discussion of the general question, and the remedy in this state; it is enough that this is not the case there decided, but within the very exception there made.

“The debt,” says Judge Duncan, quoting the words of Chancellor Kent, “is only the personal obligation of the debtor, and the charge on the land is by way of security, and is not analogous to a rent charge, which grows out of the land, and when any purchaser of a distinct part charged with the rent, takes it, he takes it with such proportionable part of the rent. The owners of land in that case, stand equal, and if the whole rent be levied on one, he shall be eased in equity by contribution from the rest of the purchasers.” 1 Eq. Ca. Ab. 112, *et seq.*; Carey’s Rep. 132.

It is often said in the English books, that the debt is the personal obligation, and the land the security. In England, land cannot be sold on a judgment, and the person of the debtor may be imprisoned, though he owns all the land in a county. Here land can be sold for debt, and must be sold before the body of the debtor can be confined. The creditor inquires as to the lands of the man he is about to trust. He gets a judgment, and that, by law, binds the lands; credit is given on the lands, and the remedy which the law gives against them, and this is universally known, and has been often repeated by judges; and by none more explicitly than by Judge Duncan. The same lien which a judgment gives on all the lands in the county, a mortgage gives on the lands comprised in it. There is some difference in the *remedy. On the judgment, you may sell chattels, any lands of the debtor, and finally take his person. On [*166] the judgment or mortgage, chattels cannot be taken, no other lands than those comprised in it, and the person never, perhaps, not even for costs. The debt on the mortgage when suit is brought on it, must come from the land, and the land only, more strictly than a rent charge. Whoever then buys any part of the mortgaged premises, takes that part subject to the mortgage, or a proportionable part of it. The mortgagor can by no act of his, discharge any part of it, or in any degree destroy the lien of the mortgagee, or vary or modify his remedy; the mortgaged premises and every part of them are, in the language of the Supreme Court of the United States, equally liable, whether in the hands of a purchaser from the mortgagor, or of the mortgagor himself. If he aliens to ten successive purchasers, the first and the last, equally gets the land subject to the mortgage; and if it is sued, every one, in the language of Lord Coke *in*

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his "note Reader" in Herbert's Case, shall be contributors. "*Hoc est*, the land of every terre tenant shall be extended."

And in chancery where the queen's grantee of a recognisance sought to extend the lands of the defendant, whereas there were divers other lands of great value in other men's hands liable to the said recognisance, it was ordered, that no liberate go out upon the said extent, until the court order the same. The Queen v. Colburn, Carey's Reports, 159. See also the same book, page 132.

It remains to notice the case of the purchase by Mr. Pepper, of the two lots sold on his own judgments, of which lots some part was comprised in the mortgage now in suit; and on the fullest consideration, I can neither find, nor on principle make, any distinction between his case and that of any other person, who had purchased the same lots, and paid the price to the sheriff, who instead of paying a proportionable part to the plaintiff, paid the whole money to Mr. Pepper. What is here settled, and what I have endeavoured to show, was always the law, is, that the purchaser at the sheriff's sale takes the property purchased clear of all incumbrances. By the law, and the practice, he must pay the price at farthest on the return of the writ, and before he gets his deed; it is impossible for him to look to the application of the money, for it is taken from him. The sheriff must pay it into court; if not, he pays it to any claimant at his own risk. If he returns the property sold, and makes, and delivers the deed, he is liable for the money, and must pay it, whether he ever has, or ever will collect it. There is no privity between any of the lien creditors and the purchaser; none of them can sue the purchaser. The title of the purchaser does not and cannot depend on the proper application of the money by the sheriff; it did not at common law on the sale of chattels. A. put an execution into the hands of the sheriff, and afterwards B. put a second execution into the hands of the same sheriff, who levied it, and sold the goods to B. This was soon after the [*167] statute, which enacted, that *chattels should be bound from the delivery of the writ to the sheriff; and the sheriff again took the goods on the writ of A., sold them, and B. brought trover, and recovered. 1 Comyn's Rep. 34, and the same case, though not so fully reported, 1 Salk. 320; 5 Mod. 377; 1 Ld. Ray. 251; Holt, 303, and the same point, 12 Johns. 162.

The owners of younger judgments frequently have an interest, that the land shall bring a fair price, and often become purchasers. When such pay their money, the law vests the property in them; and there can be no difference, between whether the sheriff and purchaser exchange receipts, or the purchaser

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pays the money, and the sheriff pays it back to him or to any other creditor not by law entitled to it. See also 1 Rawle, 302; 1 Penn. Rep. 240.

The case before cited of the Commonwealth for the use of Gurney's Executors v. Alexander, in 14 Serg. & Rawle, 257, is an express decision on this point. Park, the purchaser was a judgment creditor, before whom were many judgments, the first of which was Gurney's. This court held, that the general law is, that the sheriff was liable; whether in that case, on circumstances, is another matter. The opinion is express, however, that the purchaser held the land clear of all prior judgments. in point of fact, a large part of it went to Park himself. I speak of cases where all is fair and no collusion between the sheriff and the purchaser.

My opinion then is, that the several purchasers who bought parts of the mortgaged premises, of whom Mr. Pepper was one, hold the land discharged from this mortgage. That as to such of those parts where the money was brought into court, and paid away on the order of the court, the sheriff who paid it in, is not liable. Where it was paid by the sheriff without such order, the sheriff is to be resorted to for such proportion of the purchase-money, as shall be found due from that part of the mortgaged premises embraced by such sale. And that the property purchased by Stewart, and never sold by the law, remains liable for such proportion of the debt due on the mortgage, as shall be rated to its comparative value with the whole property mortgaged.

Judge Ross was of opinion, that the property was still subject to the mortgage, notwithstanding the sale on younger judgments or mortgages. But if not so subject, then that the part never sold by process of law, remained liable to its proportion in the hands of the vendee of the mortgagor, without regard to whether he was a first or subsequent purchaser from the mortgagor, and that if those purchasing at the sheriff's sale on younger judgments or mortgages, held clear of the oldest mortgage, the plaintiff in such younger judgment or mortgage, purchasing at such sheriff's sale, held it as a third person, being a purchaser, would have done, and then the situation of Pepper, and the other purchasers was the same.

Cited by Counsel, 3 Wh. 490; 4 Wh. 415; 5 Wh. 303; 2 W. 237; 6 W. 140; 9 W. 539; 4 W. & S. 402, 485; 2 Barr, 78; 6 Barr, 279; 9 Barr, 511; 1 J. 259, 286, 314, 330; 1 H. 113; 7 H. 33; 10 C. 329; 12 C. 468; 2 G. 517; 3 Wr. 141; 4 Wr. 175; 6 Wr. 194; 2 S. 289, 297, 360; 7 S. 391; 14 S. 56; 31 S. 111; 11 N. 128; 2 O. 549; 1 W. N. C. 595; 2 W. N. C. 498; 10 W. N. C. 526.

Cited by the Court, 3 Penn. R. 244; 5 Wh. 185; 6 Wh. 357; 7 W. 478; 8 W. 297, 394; 9 W. & S. 104; 1 Barr, 278; 2 Barr, 217; 3 Barr, 159; 4 Barr,

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119; 10 Barr, 478; 1 H. 102, 205; 8 H. 226; 12 H. 267; 10 C. 68; 11 C. 185; 12 C. 148; 23 S. 192; 1 O. 90, s. c. 9 W. N. C. 486.

The second question decided in this case—the one that divided the court—touching contribution between purchasers of different parts of the mortgaged premises and the general doctrine of the marshalling of assets, has been distinctly overruled: 1 Barr, 279; 2 Barr, 217; 4 Barr, 119; 8 H. 226; 1 O. 90.

The principal point of the case—the one previously decided in *Willard v. Norris*, 2 R. 56—has been held to be a correct exposition of the common law of this country, but has been altered by several statutes. The first, April 6th, 1830, P. l. 293, provided that the lien of a mortgage prior to all other liens, except other mortgages, ground rents, and purchase-money due the commonwealth, should not be destroyed by a sale under a *venditioni exponas* upon any subsequent lien, or by a sale under a *levari facias* upon a subsequent mortgage. In 1845 (April 16th, 1845, P. l. 488), these provisions were extended to all cases of sales made by virtue or authority of any writ of execution. March 23d, 1867 (P. l. 44), was passed a general act upon this subject as follows: “When the lien of a mortgage upon real estate is, or shall be, prior to all other liens upon the same property, except other mortgages, ground rents, purchase-money due the commonwealth, taxes, charges, assessments, and municipal claims, whose lien, though afterwards accruing, has, by law, priority given it, the lien of such mortgage shall not be destroyed, or in any way affected, by any judicial or other sale whatsoever, whether such judicial sale shall be made by virtue or authority of any order or decree of any orphans’ or other court, or of any writ of execution, or otherwise howsoever, *provided*, that this section shall not apply to cases of mortgages upon unseated lands, or sales of the same for taxes.” Subsequent legislation has changed the law as to Orphans’ Court sales in most of the counties of the state, but it remains as set forth in this Act in Philadelphia and Allegheny counties, as well as in several others. See *Brightly’s Purdon’s Digest*, Tit. “Deeds and Mortgages,” sub-head “Lien of Mortgage.”

The effect of there being a lien for taxes has been considered by the courts and regulated by the legislature, so that in Philadelphia and Allegheny counties, and perhaps in some others, the fact that a tax was duly registered before the mortgage became a lien will not operate to discharge the latter upon a sale under a junior incumbrance: 4 O. 210, s. c. 11 W. N. C. 517; 4 O. 63, s. c. 11 W. N. C. 519. See also the reference to Purdon given above.

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[PHILADELPHIA, MARCH 21, 1831.]

Jennings and Another *against* Gratz.

Though the seller is answerable to the buyer that the article shall be in specie the thing for which it was sold, yet if there be only a partial adulteration which does not destroy the distinctive character of the thing, the buyer is bound by the bargain. And in doubtful cases the test seems to be, that the article shall be merchantable under the denomination affixed to it by the seller.

THIS cause was tried before TOD, J., at *Nisi Prius*, on the 24th of November, 1829, when a verdict was given for the plaintiffs for two thousand one hundred and forty-four dollars and twenty-three cents. It now came before the court on a rule

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to show cause why the verdict should not be set aside, obtained by the counsel for the defendant.

It appeared that the plaintiffs, who were auctioneers, on the 13th of April, 1825, exposed to sale at their own auction store a quantity of teas. They were described in a catalogue, printed and distributed previously to the sale, as teas of various descriptions, and among others a large proportion of them was called "Young Hyson Tea."

The defendant became the purchaser of one hundred and six chests, for nine thousand two hundred and thirty dollars. He discovered immediately afterwards, that seventy-five chests were spurious or counterfeit, and declined receiving them; always offering, however, to receive the thirty-one chests which were genuine.

A correspondence took place between the parties in the course of which the defendant wrote to the plaintiffs, that he understood they were previously to the sale, preparing to prosecute a claim on the Chinese merchants, for the deception practiced on the supercargo in this article. The plaintiffs in replying, did not explain what subsequently appeared to be the fact, that they were pursuing a claim for breach of contract and not fraud.

The whole of the one hundred and six chests were sold by default on the 4th of May, 1825, and this suit was brought to recover the difference of price between the two sales.

The defendant alleged that the article contracted for was not the article sold, and offered to be delivered, but a substitute, different in its nature, and deleterious to health, and that therefore he was not bound to receive it; and especially that the plaintiffs confirmed him in the belief that it was not of a character that he ought to receive; as they permitted him to remain in the belief that they had been deceived in the purchase, and sold to him knowing and concealing the defects, while it was their duty in a correspondence voluntarily carried on by them, to correct the error before they resorted to the measure of a second sale.

Much evidence was given on both sides, as to the matters in controversy, which it would be useless to state, as the [*169] opinion of the court makes the question of law upon which the cause was decided, sufficiently clear without it.

J. R. Ingersoll and *Chauncey* in support of the motion for a new trial.

Binney and *Sergeant*, *contra*.

PER CURIAM.—In *Borrekins v. Bevan*, it was determined at

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the last term, that the seller is not answerable for the quality of an article that has been inspected and received by the buyer, provided it be, in specie, the thing for which it has been sold. In the case at bar, the teas were proved to be adulterated with certain leaves, which, it is believed, do not belong to the tea family. But it was also shown, that no teas of the same denomination, are entirely free from adulteration by admixture of these same leaves; and if a small degree of adulteration were permitted to affect the question of specific character, they would seldom be a binding sale. Wines are constantly adulterated with brandy; in fact, it is in some degree a constituent part of the finest Madeira; and brandy itself passes in the market, although notoriously adulterated with alcohol, in a cheaper form. Drugs, chemicals, paints, dye-stuffs, and a countless number of other commodities, are constantly purchased by dealers or consumers, with full knowledge that they are not entirely free from admixture. The pigment called white lead, is frequently purchased by house-painters, when they are apprised that it contains a portion of Spanish whiting, which is not supposed to affect the denomination of the article, but its quality and price. Adulteration may, however, be carried so far as to destroy the distinctive character of the thing altogether; and in doubtful cases there is perhaps no practical test but that of its being merchantable under the denomination affixed to it by the seller. The application of this test to the case at bar, produces a result decisively unfavourable to the defendant. The teas were re-sold at prices not greatly reduced, to dealers, although put on their guard, it may be presumed, by the defendant's repudiation of the article. As to the specific character of the teas, then the defendant was not deceived, however mistaken he may have been as to their quality; and that no fact was withheld, which it was proper for him to know, we are fully satisfied from the evidence. There is therefore no reason to disturb the verdict.

Rule discharged.

Cited by Counsel, 7 Barr, 296; 10 Barr, 324; 8 H. 451; 3 Wr. 90; 18 S. 150; 25 S. 231; 29 S. 396; 4 W. N. C. 493.

Explained, 7 H. 379.

Cited by the Court, 3 H. 125; 2 N. 324, 325, s. c. 3 W. N. C. 523.

See note *ante* p. *47.

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The Mayor, Aldermen, and Citizens of Philadelphia
against Elliott and Another, Executors of Wills.

A bequest to a corporation, not for its general purposes, but in trust for particular objects within the scope of its corporate duties, is good.

Therefore a bequest to the Mayor and Corporation of the City of Philadelphia, in trust to purchase a lot of ground, and erect thereon a hospital for the relief of the indigent blind and lame, and to manage and regulate the institution, &c, is a good and valid bequest to the Mayor, Aldermen, and Citizens of Philadelphia, for the purposes and upon the trusts declared in the will.

IN this cause, a verdict was, by agreement of the parties, rendered for the plaintiffs, for the sum of one hundred thousand dollars, subject to the opinion of the court, whether upon the evidence, the plaintiffs were entitled to recover a residuary bequest contained in the will of James Wills, deceased. If the opinion of the court should be in favour of the plaintiffs, the judgment to be entered on the verdict, was, by the agreement, to be released on the defendants transferring to the plaintiffs certain stocks therein specified. The agreement contained other provisions, which it is unnecessary to state.

The decision of the cause turned exclusively upon the question, whether the bequest contained in the following clause in the will, was a good and valid bequest, according to the law of Pennsylvania.

“Item. All the rest, residue, and remainder of my estate, real, personal, and mixed, both that which I now hold, and all that I may hereafter acquire, I give and bequeath to the Mayor and Corporation of the City of Philadelphia for the time being, and to their successors in office forever, in trust for the purchase of a sufficient plot of ground in the City of Philadelphia, or in the neighbourhood thereof, and thereon erect, or cause to be erected, suitable buildings and accommodations for an hospital or asylum, to be denominated ‘The Wills’ Hospital for the relief of the indigent blind and lame.’ The funds thus appropriated are to be put out on good mortgage security, or city stock, and after expending the necessary sum for the lot and improvements heretofore mentioned, the income of the remainder is to be exclusively applied to the comfort and accommodation of as many of the indigent blind and lame, as the income will admit of, after defraying the necessary expenses incident to such an establishment. And to the aforesaid Mayor and Corporation of the said city, and their successors in office, is entrusted the duty

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of appointing trustees or managers, and all other matters and things in any wise appertaining to the due fulfilment of the aforesaid bequest, the right regulating of the establishment, and ensuring the right application of the funds to the purposes heretofore stated, and for the sole use and benefit *of the [*171] indigent blind and lame, giving a preference to those persons resident in Philadelphia and its neighbourhood.

“*Item.* Should any dispute or misapprehension arise respecting any informality, in a legal sense or otherwise, in any of the preceding bequests, I will and ordain that they be taken according to their literal meaning, and acted upon accordingly, so as not to defeat the just and charitable intentions of the said testator.”

Sykes and *Binney*, for the plaintiffs, cited *Witman v. Lex*, 17 Serg. & Rawle, 90; 2 Ruff. Stat. 708; *Preston on Legacies*, 233, 267; *Duke on Charitable Uses*, 375, 377, 380.

J. R. Ingersoll, contra, referred to the original charter of the City of Philadelphia, 1 Dall. State Laws, App’x 11, and to the acts of 11 March, 1789 2 Sm. L. 462, and 2 April, 1790, 2 Sm. L. 526.

The opinion of the court was delivered

PER CURIAM :—Although the property involved in the event be immense, the question is without difficulty, the principal point having been determined in *Witman v. Lex*. The difference attempted here, depends on a supposed want of capacity in the plaintiff to act as a trustee for purposes foreign to the object of its incorporation. How far we might be disposed to disregard an objection depending on technical reasons, in consequence of being without the extraordinary powers of a chancellor to prevent a trust from failing of effect for want of a trustee, it is at present unnecessary to say, as one of the very objects of this corporation is precisely that, which is indicated by the testator—the maintenance and care of its indigent blind and lame. The only thing peculiar to the fund, is the direction to apply it, not to the general purposes of the corporation, but to particular objects within the scope of its corporate duties; and for the accomplishment of those objects, it is clear, that it has capacity to take and to act as a trustee.

Judgment for the plaintiffs according to the agreement filed.

Cited by Counsel, 7 Barr, 360; 10 Barr, 24; 6 C. 440; 11 C. 318; 9 Wr. 18; 14 S. 177.

Cited by the Court, 6 C. 435; 2 N. 211, s. c. 4 W. N. C. 123.

See also 2 How. (U. S.) 127; 7 Wall. 14.

*[PHILADELPHIA, MARCH 31, 1831.]

[*172]

Weekerly *against* The Ministers, Vestrymen, and Church-wardens of The German Lutheran Congregation in and near the City of Philadelphia, in the State of Pennsylvania.

An action cannot be maintained against a corporation, by one, who, by their appointment, has acted as a judge and inspector of a corporation election, to recover indemnity for the amount of damages and costs, previously recovered against him by a corporator, for having fraudulently and maliciously refused his vote when offered; whether a promise of indemnity be considered as having been made before the election, or after it has taken place, and the plaintiff been sued or threatened with a suit by the aggrieved corporator.

And the record of the suit brought against the plaintiff, by such corporator, is conclusive evidence, that the vote was fraudulently and maliciously rejected when offered.

THE plaintiff in this case having obtained against the defendants a verdict for two thousand five hundred and fifty dollars, a rule was granted, on behalf of the latter, for a new trial, which was argued by *J. Randall* in support of the rule, and by *J. R. Ingersoll* against it.

The opinion of the court, which embraces all that is material in the case, was delivered by

KENNEDY, J.—This is an action on the case, and was brought by the plaintiff against the defendants, to recover and be indemnified for the amount of damages and costs which were recovered from him in three actions brought against him severally by Andrew Geyer, H. Burkhardt, and P. Lex, for having fraudulently and maliciously refused to receive their respective votes at an election held by the members of the German Lutheran Congregations of St. Michael's and Zion's churches, on the 29th day of October, 1821, the plaintiff being one of the judges and inspectors of the election, and for other charges which he had to pay on account of his defence in these actions.

The plaintiff has filed a declaration in this case in *assumpsit* containing four counts: The first three for money paid, laid out, and expended—money lent and advanced—money had and received, and the last upon an account stated.

The case was tried at Nisi Prius, in Philadelphia, in December, 1830, and verdict given in favour of the plaintiff for two thousand five hundred and fifty dollars and six cents damages. The defendants, on motion, obtained a rule of this court on the plaintiff, to show cause why a new trial should not be granted, for the reasons filed by their counsel.

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It is unnecessary to notice and express an opinion upon all the reasons assigned for a new trial; inasmuch as a majority of the court are satisfied that the plaintiff, from his own showing, cannot maintain this action. The second and fifth reasons, having reference to *the ground upon which the plaintiff [*173] claims to sustain it, will therefore only be considered.

The plaintiff professes to found his claim upon an undertaking and promise of the defendants, which he alleges was made, to indemnify him, for and on account of what he did as a judge and inspector of their election, in rejecting the votes of A. Geyer, H. Burkhardt, and P. Lex. The plaintiff, in order to maintain his action, first gave in evidence the records of the several actions brought against him by Geyer, Burkhardt, and Lex, in each of which it appears that he is charged with having fraudulently and maliciously refused to receive the vote of the plaintiff therein; and the record further shows that this charge was upon the trial proved to be true, and that a verdict and judgment passed against him in each case, for damages and costs, which he seeks to have reimbursed by this suit.

That recoveries were had against the plaintiff in these actions, and that the amount thereof, together with the moneys expended by him in defending the same, have not been paid and reimbursed to him by the defendants, form the basis of his complaint in this suit. He alleges that the defendants undertook to indemnify and save him harmless against those suits; of which undertaking, if he gave any evidence, it was but very slight indeed. Without, however, being able to establish such an undertaking, he does not pretend that he could sustain his action. To allow the plaintiff, then, the utmost latitude of range that he can possibly claim for supporting this action, I shall consider, first, the effect of an executory contract, supposing it to have been made previously to the election, and having for its consideration the mutual promises of the parties: That is, that the plaintiff agreed to be an inspector and judge of the election, and that he would fraudulently and maliciously reject the votes of Geyer, Burkhardt, and Lex, if offered, and that the defendants, in consideration thereof, agreed and promised the plaintiff to keep him indemnified, and to bear him harmless. In the next place, I will consider the effect of a promise or undertaking on the part of the defendants, supposing it to have been made after the election had taken place, and after that the plaintiff had been sued or threatened with these suits, by Geyer, Burkhardt, and Lex, and having for its consideration that which had already past, and been transacted, to wit, that in consideration that the plaintiff had, at the request of the defendants, and under their appointment, acted as judge

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and inspector of the election, and in doing so, had rejected the votes of Geyer, Burkhardt, and Lex, in conformity to their wishes, which met their entire approbation, and, as suits were instituted by these several persons against the plaintiff, that they, the defendants, agreed and promised to indemnify, and bear him harmless.

As to the first point of view in which it has been mentioned, to consider the plaintiff's cause of action, it is obvious that the act agreed to be done by him, or the course that he agreed he would pursue, which forms the consideration for the promise of indemnity, *is of a highly criminal nature, and prohibited by law. It was, that he, being appointed a [*174] judge and inspector of the election, would fraudulently and maliciously reject the votes, if offered, of Geyer, Burkhardt, and Lex, each of whom was entitled to vote. For if the plaintiff does not claim that the defendants agreed to indemnify him for fraudulently and maliciously refusing to receive the votes of these persons, but merely that they agreed to indemnify and save him harmless, for acting as an inspector and judge of the election, then these recoveries of damages and costs in the suits by Geyer and others, can furnish no ground or claim whatever against the defendants, because they were had expressly on the principle that the plaintiff acted fraudulently and maliciously, and not because he acted as a judge and inspector of the election, and in doing so, rejected the votes.

If the promise was not to indemnify the plaintiff for acting thus fraudulently and maliciously, but for acting uprightly, and according to the best of his judgment, it is clear that such a promise cannot be extended to embrace and protect against these recoveries. But if the promise of indemnity is made to provide against these recoveries, it amounts to this, that the defendants agreed to indemnify the plaintiff against his own fraudulent and malicious conduct. The common law, however, prohibits everything which is unjust or *contra bonos mores*, or against its policy in any respect, or against the provisions of the statute, or the rules and claims of delicacy.

Therefore a contract or agreement, which is made in contravention of these general principles, is void; for instance, if the defendant, in consideration of twenty shillings paid to him by the plaintiff, promise that he will pay the plaintiff forty shillings if he does not beat J. S. out of such a close; this is illegal and void, 2 Lev. 174. So if the defendant request the plaintiff to beat another, and promise to save him harmless; this is a void consideration, for the act is unlawful, Hutt. 56.

An agreement by the plaintiff to fight, or a licence given by him to the defendant to beat him, will not prevent him from re-

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covering damages for the injury done by the beating, upon the principle of *volenti non fit injuria*: because fighting is unlawful, and to strike or beat another with or without his consent is a breach of the peace. Bul. Ni. Pri. 16; Comb. 218. So if a condition of an obligation be to do a thing, which is *malum in se*, the condition and obligation are both void: as if an obligation be with condition to kill another, Co. Lit. b. 266, or to maintain and use such a one as his wife, who is the wife of another. Mo. 477; Com. Dig. tit. Cond. (D.) 71. So if the condition be to enlarge out of prison, or suffer his escape. Hob. 14; Hard. 464; see also Cowper, 343.

A court of law will sustain an action for contribution between two debtors or sureties, under an implied assumpsit, arising from the knowledge and operation of the general principle, that [*175] equality is equity, *but not between two joint trespassers. 2 Johns. Ch. 136; Coventry v. Barton, 17 Johns. Rep. 142.

Neither will equity interpose to compel contribution or to grant relief, as between joint tort-feasors. For *ex turpi contractu actio non oritur*, is a rule both in law and equity. 1 Fonb. on Equi. book 1, c. 4, s. 4, note y. There is, however, a distinction between promises of indemnity which are, and those which are not void. If the act directed or agreed to be done, is known to be wrong, an express promise to indemnify would be illegal and void; but if it was not known at the time to be wrong, the promise of indemnity would be good and binding. Coventry v. Barton, 17 Johns. Rep. 144; Cowp. 343; Winch. 49; Bul. N. P. 146; Com. on Con. 31; 2 Johns. Ca. 54.

Public policy seems to justify and vindicate these principles.—What security would men have for their property, or for those rights of still infinitely more value which belongs to their persons, if it were known that each of all those who combine for the purpose of trespassing upon such rights is entitled to claim the interposition of courts of justice to compel his aiders, abettors, and promisers of indemnification, to reimburse him their proportional part of the damages, which he had been compelled to pay, in order to compensate the party injured?

That a joint-wrong-doer, or he who knowingly violates the right of another, at the instance of a third person, and upon the faith of his promise of indemnity, cannot have contribution or indemnification, operates as a salutary check against the commission of wrongs. It cannot be pretended that the plaintiff could have been guilty of the conduct imputed to him by Geyer, and others, in their actions against him, without his being conscious, and knowing at the time, that it was wrong; the very

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nature of the act itself precludes all idea of the kind. Ignorance therefore forms no excuse for him.

I will now examine the case, supposing the promises of indemnity to have been made upon a past consideration, as stated in the second view intended to be taken of the subject.

The plaintiff's counsel has contended that the plaintiff was as it were the agent of the corporation, or the defendants, acting under their authority, and although prompted to do that which was wrong, yet the promise of the corporation, or the defendants, afterwards to indemnify him against all the consequences, ought to be considered binding, and a protection to the plaintiff who had, as he alleges, no individual interest in the matter. That a past transaction, although illegal, may be a good consideration for a contract, in certain cases, must be admitted. As in the case of the Marquis of Annandale, who having seduced Ann Harris, had a child by her, and afterwards gave her his bond for the payment of a sum of money, which was held good. 2 P. Wms. 432. The same principle was also decided in *Turner v. Vaughan*, 2 Wils. 339. These cases may be considered as forming a class, perhaps, rather of a peculiar character: and in regard *to them it must be admitted that a distinction [*176] has been taken between the past immoral and illegal conduct or acts of the party, being made the consideration of a contract, and that which is of an immoral and illegal nature, but agreed to be done in future.

It has already been abundantly shown, that every contract resting upon such a basis for its support, as an immoral or illegal act agreed to be done in future, where the party agreeing to do it, at the same time knows it to be wrong, is without any exception void, and cannot be enforced either at law or in equity. That there has been a strong leaning on the part of both courts of law and equity to relieve innocent and seduced females from the operation of the general principle of law, as applicable to wrong-doers, cannot, I think be doubted. And it may be right to do so; when we consider the ascendancy a man may obtain over an innocent female, who is made to believe, that she is the sole object of his undivided love and affection, and that in most cases they are made to believe all this for the purpose of effecting their ruin forever. Again when we reflect, that the man in such case is almost uniformly the aggressor, and the female the only sufferer, it needs not be wondered at, that such cases have been brought to be judged of by a rule, perhaps, peculiar to themselves.

Indeed, it has been regretted by some, that the law did not give a right of action to the female directly in such a case against her seducer, in order to be redressed in some measure

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for the injury done to her. This, however, cannot be as long as the law considers her *particeps criminis*, (though certainly not so in equal degrees,) and as long as the rule is *voluntati non fit injuria*. As evidence of the feelings of our courts and juries, and of what may now be considered the law in these cases, very slight circumstances are laid hold of, such as afford at most but a mere colourable pretext for sustaining actions against the seducers, for the recovery of damages, which when obtained, are generally given by the plaintiff in these actions to the parties really injured. Thus the law gives a right to the parent or other person, with whom the female happens to be living at the time, even where she is of full age, and for whom it can be proved, she has done some very slight service; the least imaginable will be sufficient, whether done under a contract or not, to maintain an action against the seducer, upon the idea or notion, that the plaintiff has thereby lost the benefit of her service, although he may have had no right whatever to claim it. The value of the service lost is never made the measure of the damages recovered in such cases.

The good character and standing of the female previously to such connection, as also that of her family and relatives, are all taken into consideration by the jury; as also the painful feelings and distress of mind, which it may be reasonably presumed, they suffered by reason of the same; and with a view to make réparation for all these things as well as to punish the defendant, who has not only been the cause of blasting forever the reputation, and prospects of an amiable female, but of breaking up and destroying the peace of an innocent *and respectable family, the jury with the entire approbation of the court, has given a verdict against the defendant for thousands of dollars, where the damages actually sustained by loss of service, could have been nothing more than nominal or ideal.

It will be difficult, I apprehend, to bring the plaintiff's case here within the principle of this class. We might indeed suppose a case, which would bear perhaps some analogy to the one, upon which the plaintiff here asserts his right to recover, if it were possible to conceive such a thing of the defendants as a corporation; that the plaintiff had under the advice of the defendants seduced and debauched an innocent young female; that upon suit being brought against him by her father to recover damages *per quod servitium amisit*, the defendants had promised to indemnify the plaintiff, who was afterwards compelled to pay to the father heavy damages.

If this were the plaintiff's case, can it be imagined, that he would be entitled to recover? I think not. The damages which

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he had been made to pay, as to him, could be considered only a just punishment for his offence. It would be no excuse for, or even palliation of his conduct, that he was advised to do so by the defendant. And why should he be relieved from the punishment, which the law had so justly inflicted upon him? It would, as it appears to me, be contrary to every principle of sound policy as well as of natural justice.

The plaintiff cannot be considered in this transaction, as his counsel has contended, as having acted in the character of an agent to the defendants. The office of an inspector and judge of the election, was created by law, and although the plaintiff was appointed to that office by the defendants as a corporation, he as soon as appointed became the officer of the law, and the course which he was to pursue, as well as the duties or acts, which he was to perform, were all prescribed by law.

It was therefore the law, that he was bound to regard and obey. He was subject in no respect to the defendants, as an agent is to his principal. The office of a judge and inspector of an election is certainly of great responsibility.

It is of the utmost importance to the public, that its duties should be performed with the strictest integrity. It is said and admitted, that the plaintiff was not of the vestry or church-wardens of the corporation, and as such could have felt no particular concern in the election.

Nor can it be perceived, why the corporation should have had a desire, that the plaintiff should have done what he did. Some of its members might have wished it, but we must not mistake the individual members for the corporation.

But then since the plaintiff was not one of the trustees or officers of the corporation, can any motive be imagined, that will afford the least palliation for his conduct, when acting as the judge and inspector of the election, in fraudulently and maliciously refusing to receive *the votes of those who were [*178] entitled to vote: To the honour and credit of the state, it is the only and first instance of the kind, I believe, that has occurred and come under judicial notice. Yet shall it be said, that conduct so highly criminal and injurious to the public without any motive that can be conceived, other than those of the most base and dishonourable cast, shall form a good and legal consideration for a subsequent promise?

The defendants, as in the case of a seducer, cannot be said to have done any act, by which the plaintiff has sustained an injury either in pocket or reputation. His conduct which occasioned the suits and recoveries against him, was of his own will and malice, and for which he and he alone ought to be responsible, and the damages recovered against him must have been given

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as due to his offence, rather than to the plaintiffs for any actual loss or injury sustained by them.

It is out of the question to say, that the defendants who are sued here as a corporation could in that capacity be said to have advised or requested him to act as he did, merely because he was appointed by them the inspector of the election. When appointed he became as has been already observed, the officer of the law, and any wish or desire they might have had, cannot be considered as accompanying the appointment, or connected with it in any way. Upon what principle of consistency and reason can the corporation be connected with the plaintiff in this transaction, and made to reimburse him the moneys which were justly recovered by individual corporators of the same corporation, and to pay him out of the corporation funds, which partly belong to those persons who recovered from him? This would in effect be to make them refund part at least of the money so recovered, which would be an act of injustice towards them, as well as towards all the other corporators, who did not approve of the conduct of the plaintiff. The defendants as a corporation have done no injury to the plaintiff, nor does it appear, that they did or advised any act to be done, whereby loss, damage, or injury has arisen to the plaintiff: nor have they derived any benefit or advantage from his act or conduct: and if so, there can be no consideration to support the promise of indemnity, which the plaintiff pretends was made by the defendants.

It does not appear to me, that the defendants ever were under any obligation, either legal, moral, or equitable to indemnify the plaintiff, or that they ever requested the plaintiff to do as he did, without one or other of which there is no colour of consideration to support a promise.

But it is further contended by the plaintiff's counsel, that although it was alleged against the plaintiff in the suits brought against him by Guyer, Burkhardt, and Lex, that he fraudulently and maliciously rejected their votes when offered, and that such conduct, if true, may not be considered as a good consideration for the promise of indemnity, yet that the finding of the juries in those cases, that he did fraudulently and maliciously reject [*179] their votes, was not conclusive evidence of the fact against him on the trial of this cause, because not between the same parties. The learned judge, before whom this cause was tried at *Nisi Prius*, inclined to be of this opinion, and directed the jury that the records of those suits as between the parties to this action, were not conclusive evidence, that the plaintiff had acted fraudulently and maliciously as therein charged. To this proposition I cannot yield my assent.

It is true as a general rule, that a record of a suit and judg-

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ment is evidence only between the same parties and privies thereto, and conclusive upon no others. It is, however, but a general rule, and of course admits of exceptions. The vendor, who guaranties the title of the property sold to his vendee, in case of a suit brought against the vendee, of which he immediately gives notice to his vendor, and afterwards a recovery of the property is had against the vendee upon a better and older title, is bound by this decision, although not a party on the record to the suit; and will not be permitted to gainsay or question the correctness of it in an action brought by his vendee against him upon his guaranty.

So in the case of an action of ejectment brought against the tenant of a third person, of which notice is given to the landlord, who does not become a party to the suit, and a recovery is had against the tenant, who is turned out of possession, and afterwards by suit of which the landlord had like notice, is compelled to pay to the plaintiff in the ejectment the mesne profits of the land recovered; the landlord in an action brought against him by the tenant to recover and be indemnified for the mesne profits and costs which he was compelled to pay, will not be permitted to allege or prove that either the recovery in the action of ejectment, or for the mesne profits, was wrong. He is concluded by the record in each of these cases, although not a party to them. I consider these cases exceptions to the general rule, because the vendor in the first case, and the landlord in the last, after notice of the suits being brought, would have been admitted to defend, if they had wished it, and thus being entitled to claim all the benefits of a party to the suit, they are bound and concluded by the decision of the jury and court in the same. See *Jackson v. Marsh*, 5 Wend. 46; *Leather v. Poultney*, 4 Binn. 356; *Bender v. Fromberger*, 4 Dall. 436, in note; *Kip v. Brigham*, 7 Johns. Rep. 168; *Waldo v. Long*, 7 Johns. Rep. 173; *Bond v. Ward*, 1 Nott & M'Cord, 201; *Tyler v. Ulmer*, 12 Mass. 166. See also *Stone v. Hocker*, 9 Cowan, 154, and *Hamilton v. Cutts*, 4 Mass. Rep. 349, from which the same principle is deducible.

The plaintiff here alleges that the defendants were connected with the suit brought against him by Guyer, Burkhardt, and Lex, through their promise of indemnity to him, and certainly without this connection the plaintiff could not pretend, that he had the least colour of cause of action; and being so connected according to the allegation of the plaintiff himself, this upon the principle and authority of the *cases referred to, [*180] would make the records of those suits conclusive, not only upon the plaintiff, but upon the defendants, if they had notice in due time of those suits being brought, so as to afford

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them a full opportunity of making any defence that might exist. That they had such notice was shown by a resolution passed by them as a corporation on the 30th of November, 1821, and read in evidence by the plaintiff from the book kept by the defendants for the purpose of registering their proceedings in it as a corporation.

There is also another principle, upon which I consider the records of these suits conclusive evidence of the justness and correctness of the recoveries therein had against him. It appears to me that whenever a plaintiff introduces and makes the record of an action, and a recovery therein against himself, the foundation of his suit or basis of his claim in an action brought by him afterwards against a third person, he is not at liberty to deny the principle, upon which it appears from the face of the record itself, that the action was decided, and the recovery had against him, or in other words to prove, that the recovery was wrong. Neither can I conceive how it could avail him to be permitted to make such proof, as will be seen in the sequel. It is said, that the plaintiff produced and gave in evidence these records to show the amount of recoveries against him; which he claimed to have of the defendants; but surely it was quite as necessary, that he should also prove and show the cause, for which their recoveries were had, for without that being done, it would be impossible to connect these defendants in any way with those recoveries. And how could that be legally done, but by the record, or a duly certified copy thereof, where the cause of action appears to be fully set forth and spread upon it.

It would be the very best evidence that the nature of things would admit of; and where a record and that alone, or a duly authenticated copy thereof must be given in evidence to prove a certain fact, I apprehend, it cannot be contradicted or set aside except for and on account of fraud practised in its concoction.

The principle which I have just laid down, is fully recognised and set forth by Chief Justice Spencer in *Marquand v. Webb*, 16 Johns. Rep. 93, where the action was for repairs done to a vessel against one part owner, who neglected to plead the non-joinder of the others in abatement, and one of them was offered on the part of the plaintiff as a witness to prove, that the defendant was an owner of the vessel, but held not admissible. Upon this question the chief justice, in delivering the opinion of the court, says, "He (meaning the witness) was undoubtedly interested to render the burthen upon himself as light as possible, and to throw it on the defendant in part. It is true the witness was liable to contribution, but the defendant could never controvert afterwards with the witness in case he sued him for

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contribution, that he (the defendant) was not a part owner of the vessel. He could not take the ground, that a verdict had been recovered against him by the present plaintiffs wrongfully. The very *basis of a suit to be brought by him for contribu- [*181] tion, must be that he was a part owner. Upon any other principle he would be remediless. The recovery in this case would be evidence of the amount he was compelled to pay." Connected with this part of the case there is also another principle established in relation to the evidence given by a party, which is, that it is not competent for him to insist upon the effect of one part of the paper constituting his own evidence, without giving the other party the benefit of the other facts contained in the same paper. *Greenleaf v. Birth*, 5 Peters' Rep. 138.

But even if it were not so, and the judge was correct in his opinion as to this point, I am still at a loss to perceive how the plaintiff is to improve and make good his claim in this action against the defendants, by proving that he did not act fraudulently and maliciously as a judge and inspector of the election as set forth in the records of those suits: for if he acted uprightly, and the recoveries against him were wrong, then he has no claim to indemnity of the defendants, because it must be intended, that this promise of indemnity, if any were given, was given against such a recovery or recoveries as should be right and just, and not against those, which the plaintiff in contradiction of the records, is pleased to allege, are unjust and wrong. Nor can it be supposed for a moment that a promise of indemnity was given, or even, that it could have entered into the heads of the defendants to think of giving, or that of the plaintiff to dream of asking for a promise of indemnity for and on account of his acting in the office of inspector of the election, and performing the duties of it with honesty and perfect integrity; because both parties must have been aware and well assured, that such conduct required no indemnity, and would furnish no possible cause of action, or just ground of complaint from any quarter. Upon the whole then it comes to this, that if the plaintiff did not reject the votes fraudulently and maliciously, but honestly and accordingly to the best of his judgment, there is no promise or engagement of the defendants to meet and relieve him from these unjust recoveries; but if he rejected them fraudulently and maliciously, as it was found against him in those suits that he did, then the illegality of consideration for the promise of indemnity returns to meet and oppose his claim with full force. I also think, the plaintiff cannot recover of the defendants in this action, who are sued as a corporation, because they as such had no power or authority to make such a promise of indemnity, as that under which the plaintiff claims to recover. It would have

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been a misapplication and waste of the funds of the corporation.

The minister, vestrymen, and church-wardens of the German Lutheran church, were mere trustees for the congregation and corporators, and had no power or authority over either the congregation or its funds, other than that which is given by the act of incorporation. They are expressly restrained by the 6th section of their charter, from Thomas and Richard Penn, in the [*182] use and appropriation *which shall be made of the funds and estate belonging to the corporation.

This section declares, that they shall be applied to "the maintenance and support of the rector, ministers, and officers duly settled and officiating in the said Lutheran congregation, putting in good order and keeping in repair the burying ground, school, and parsonage houses and other houses, which did then or thereafter shall belong to the said congregation, and for supporting, repairing or rebuilding the said St. Michael's church, and erecting and supporting one church more within the said city of Philadelphia, or liberties thereof, for the better accommodating the said congregation, and that they shall not be appropriated to any other purpose whatsoever."

Without a direct violation of this section in the charter, it appears to me to be impossible for the corporation to make a promise of indemnity to the plaintiff, that would call forth the funds of the corporation to reimburse him the amount of the damages and costs recovered from him by Guyer, Burkhardt, and Lex, together with the moneys expended by him in defending against the same.

It cannot be pretended, that the existence, well-being, or interests of the corporation were involved in any way in these suits against the plaintiff. No question could properly have been raised or presented, and have been decided on, that would or could have affected their rights. If so, there could have been no colour for the corporation interposing and giving to the plaintiff a promise of indemnity. It had no power or authority, and therefore could not do it. Unless it can be shown, that such a power was delegated to it, or was proper to be exercised for the purpose of carrying into effect the design and object, for which the incorporation was created, the promise of indemnity, if ever made, must be considered void for want of authority as against the corporation. Nothing of the kind has been, nor do I believe, that it can be shown. See 2 Cowan, 664, 678; Head v. The Providence Ins. Co., 2 Cranch, 127, 166; 4 Burr. 2204, 7, 8.

I think, that the plaintiff has no right to recover of the defendants under any view that can be taken of his claim.

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The rule to show cause why a new trial should not be granted, is therefore made absolute.

Rule absolute.

Cited by Counsel, 2 Barr, 287; 10 Barr, 166; 7 S. 216.

Commented on, 3 Wh. 274.

Cited by the Court, 5 W. 229; 11 H. 432; 8 S. 102.

*[PHILADELPHIA, MARCH 31, 1831.]

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Pidcock for the Use of Closson *against* Bye.

APPEAL.

Action of *assumpsit* may be maintained against the assignee of land, subject to the charge of a widow's thirds, to recover the principal of such charge, by those entitled to it after her death, without an express promise to pay it on the part of the assignee; but the judgment must be entered so as to make the land only liable, and not the defendant personally.

APPEAL from the Circuit Court of *Bucks* county.

This was an action of *assumpsit* brought by Joseph Pidcock for the use of Isaac Closson against John Bye, in which the plaintiff declared in effect:—That Benjamin Pidcock was seised in his demesne as of fee, of and in two messuages or tenements and tracts of land, containing one hundred and ninety-nine acres, situated in Solebury township in the county of Bucks; and being so seised, died intestate on the tenth of July, 1789: That at an Orphans' Court, held, &c., on the 6th of May, 1800, Sarah Pidcock, the widow of the deceased, Joseph Pidcock, his eldest son, William Boyd, and Elizabeth his wife (she being a daughter of the deceased,) John Scholfield, who purchased the purpart of Mary Lear, formerly Pidcock, an other daughter, and Watson Fell guardian of Sarah Ely, only daughter of Hannah Ely, another daughter of the deceased who died intestate, being all the children and legal representatives of the deceased, presented their petition to the court, naming seven men, and praying the court to appoint the men so named, to make partition or valuation of the said premises, according to law: That the said court accordingly appointed them; and that at an Orphans' Court held, &c., on the sixth of August, 1800, made return, finding that the premises could not be parted and divided, and valuing and appraising the same at and for the sum of nine hundred and eighty-two pounds one shilling and four pence, subject to the dower of the said Sarah Pidcock, widow of the intestate, which the inquest valued and estimated at nineteen pounds twelve shillings and nine pence three farth-

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ings, to be paid unto her annually during the term of her natural life: That the said valuation and return was on the day and year last aforesaid confirmed: That at an Orphans' Court held, &c., on the eighteenth of September, 1800, Joseph Pidcock, the eldest son, appeared and prayed that the said premises might be adjudged to him at the valuation, and entered into bonds with sureties to the other children and representatives for their distributive shares; whereupon the premises were adjudged to him, subject to the payment of the sum of three hundred and twenty-seven pounds seven shillings and one and a half pence, unto the [*184] other children and *representatives, upon the death of the widow; two shares of which belonged to the said Joseph Pidcock, and the interest of the said sum to be paid to her annually, during the term of her natural life; all which by the record, &c., produced, &c., appears.

That the said Joseph Pidcock, having so accepted the said real estate and became seised thereof, on the third day of March, 1800, at, &c., and by articles of sale sold the same to a certain Richard D. Courson, for the price and sum of thirteen hundred and ten pounds, wherein it was covenanted between the vendor and vendee, among other things, that the sum of four hundred pounds, part of the purchase-money, should remain a lien on the real estate sold during the lifetime of the widow Pidcock, the interest whereof was to be paid to her annually during her natural life; and at and upon her decease the principal of four hundred pounds to be paid to the said Joseph Pidcock, by the said Richard D. Courson, as by the same article, sealed, &c., and &c., produced, appears.

That on the 1st of April, 1801, the said Joseph Pidcock, in pursuance of the said agreement, and at the request of the said Richard D. Courson, by his deed of indenture, granted, bargained, sold, and conveyed the real estate aforesaid, unto the said Richard D. Courson, to hold to him, his heirs and assigns forever, for the aforesaid consideration of thirteen hundred and ten pounds, wherein and whereby it was covenanted and agreed that the said sum of four hundred pounds shall be and remain a lien upon the real estate conveyed during the lifetime of the said Sarah Pidcock, widow, &c., the interest thereof to be paid to her annually during her natural life, and at and upon her decease the said principal sum of four hundred pounds, to be paid to the said Joseph Pidcock by the said Richard D. Courson, as by the same deed duly executed and acknowledged and recorded, and here into court produced, will fully appear. By force whereof the said Richard D. Courson then and there became seised of the real estate aforesaid, and entered thereinto, and thereby became chargeable and liable to pay unto the said

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Sarah Pidcock the interest of the said dower or thirds, during her natural life, and at her decease the principal of the said dower-money or thirds, unto the said Joseph Pidcock.

That the said Richard D. Courson being so seised and possessed thereof, charged with the payment of the dower or thirds aforesaid, as aforesaid, &c., of other real estate in the county aforesaid, on the — day of A. D. 1815, died intestate, leaving issue Richard D. Courson, and Hannah the wife of John Bye: That on the twenty-eighth day of August, 1815, Richard D. Courson, his eldest son, and John Bye in right of Hannah his wife, only daughter of the deceased, presented their petition to the Orphans' Court of Bucks county, praying the court to award an inquisition to make partition of the real estate of the deceased, &c., which was awarded.

That on the twenty-ninth day of August, 1815, Samuel Sellers, Esq., high sheriff, &c., made return of an inquisition, whereby it was found that the said Richard D. Courson died seized of two certain messuages *and tracts of land, [*185] situated in Solebury township aforesaid,—the one containing one hundred and seventy-two acres and one hundred and nineteen perches, which they valued at fifty-eight dollars per acre; the other, or second messuage, containing about two hundred acres which they valued at forty-eight dollars per acre, amounting to nine thousand six hundred dollars, which said last messuage and tract, they found was subject to the annual payment of fifty-two dollars and thirty-eight cents to Sarah Pidcock, widow, &c., of Benjamin Pidcock deceased, at whose death the principal of the said sum, amounting to eight hundred and seventy-three dollars, will be due and payable, which inquisition was thereupon confirmed by the said court, as by the record, &c., produced, &c., appears.

That afterwards the said Richard D. Courson, and John Bye and Hannah his wife, in right of the said Hannah, concluded and agreed to make partition of the same between themselves, by deed of conveyance and release: That Richard D. Courson should have the first-mentioned messuage and tract of one hundred and seventy-two acres and one hundred and nineteen perches of land, and that the said John Bye, in right of his wife Hannah, should have the second above-mentioned messuage and tract of about two hundred acres of land, subject to the dower or thirds of the said widow Pidcock, the interest to be paid unto her annually, during her natural life, and at her death, the principal sum of eight hundred and seventy-three dollars, to the said Joseph Pidcock. And that the said Richard D. Courson and John Bye and Hannah his wife, for the purpose of carrying the

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said agreement into effect, and making a final determination of the said estate, on the 5th of March, 1816, by their joint deeds, conveyed and released unto each other, the aforesaid two several messuages and tract of land and real estate. The said John Bye and Hannah his wife, conveyed and released to the said Richard D. Courson, the first above mentioned messuage and tract of one hundred and seventy-two acres and one hundred and nineteen perches in fee, and the said Richard D. Courson and Helen his wife, conveyed and released unto the said John Bye and Hannah his wife, the second above mentioned messuage and tract of about two hundred acres of land, subject to the dower or thirds of the said widow Pidcock, the interest to be paid to her annually, during her natural life, and at her death, the principal sum of eight hundred and seventy-three dollars, to the said Joseph Pidcock: To be held by the said John Bye and Hannah his wife for such estate, and under and subject to all, each and every such rents, payments, and agreements, covenants, provisions, limitations, exceptions, restrictions, records, reversions, and dower, as the said Richard D. Courson deceased, had held and stood seized of the same at and immediately before the time of his death; as by the said deed of conveyance and release, duly executed and acknowledged and recorded, and here, &c., produced, will fully appear; by force whereof the said John Bye then and there became seized of the real estate last aforesaid mentioned, entered thereinto, and thereby became charge-
[*186] able *and liable to pay unto the said Sarah Pidcock, the interest of the said dower or thirds during her natural life, and at and upon her decease, the principal, viz., eight hundred and seventy-three dollars, unto the said Joseph Pidcock.

That Sarah Pidcock died on the 11th of May, 1818, of which the defendant then, &c., had notice, and that the said John Bye, in consideration of his promises aforesaid, and his assumption aforesaid, and being so indebted afterwards, to wit, the day and year last aforesaid, at the county aforesaid, and often afterwards, upon himself did assume, and unto the said Joseph, then and there faithfully promise that he, the said John Bye, the aforesaid eight hundred and seventy-three dollars, unto the said Joseph, when he thereto afterwards should be requested, would well and truly pay and content. Nevertheless, the said John, his promises, &c., not regarding, &c., did not pay the said sum of eight hundred and seventy-three dollars, &c., (except the sum of one hundred and nineteen dollars, part thereof, in the year 1820,) although requested, &c., on the 11th of May, 1818, and often afterwards, &c., to the damage of the plaintiff one thousand dollars, &c.

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The second count was for eight hundred and seventy-three dollars, money had and received to the plaintiff's use.

The defendant pleaded *non assumpsit, non assumpsit infra sex annos, actio non accrevit infra sex annos*. The cause was tried on the 7th of March, 1831, before the chief justice at Doylestown.

The plaintiff, in opening, claimed two-sixths of the sum of eight hundred and seventy-three dollars, mentioned in the declaration, allowing a credit for one hundred and nineteen dollars, received by him on account, in 1820.

The plaintiff gave in evidence the records of the proceedings in the Orphans' Court, referred to in the declaration. He also gave in evidence the articles of agreement between Joseph Pidcock and Richard D. Courson, which were in these words :

"3d of March, 1800. Conditions of public vendue, &c. "Struck off to Richard D. Courson for one thousand three hundred and seventy pounds, to be paid as follows : On the 1st of "April, 1800, deed and possession to be given, when purchaser "is to pay three hundred pounds, and on that day come twelve "months, three hundred pounds, and all the interest due on the "balance after the first payment is made, at which time he may "have a good title, on giving bond and security for the re- "mainder, which is to be paid in two equal payments, except "four hundred pounds to remain in the place on interest during "the lifetime of the said widow."

He further gave in evidence a deed bearing date the 1st of April, 1801, from Joseph Pidcock to Richard D. Courson, conveying the premises subject to the payment of nineteen pounds twelve shillings and three pence annually, to Sarah Pidcock during life, to which was annexed a receipt for one thousand three hundred and ten pounds, the amount of the purchase-money : A deed dated March 5th, 1816, by which Richard D. Courson and Helen his wife released to John Bye *and Hannah his wife, and the heirs and assigns of the said [*187] Hannah, all their interest, &c., in the tract of two hundred acres ; reciting the proceedings in the Orphans' Court ; that the tract had been valued by the inquest, as subject to the yearly payment to the widow of Benjamin Pidcock, and to the payment of the principal sum, to his heirs, after her death, and to certain rents payable to the Loganian library ; that the parties had subsequently made a partition among themselves, and granting the same, subject, &c., as the said Richard D. Courson, deceased, had and held the same, at and immediately before his decease ; and a release bearing the same date, from John Bye and Hannah his wife, to Richard D. Courson, of the other tract, reciting the

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inquisition and proceedings, &c., and that the parties had subsequently agreed to make partition, &c.

The death of the widow Pidcock was proved, and that her agent had regularly received from John Bye her dower, for several years, up to the time of her death. It was also proved by one witness, that John Bye had some years before made payments to Closson on account of the Pidcock dower, amounting to about one hundred dollars; and by another witness, who was one of the arbitrators, by whom the cause had previously been heard, that John Bye had produced before them two receipts, signed by Closson, for payments amounting together to about one hundred and nineteen dollars. The witness did not know what they were exactly, but they were for a credit in this suit.

The plaintiff having closed his evidence, the defendant produced Joseph Pidcock as a witness, to prove that the matter had been settled with Richard D. Courson, deceased. Instead of this, he proved that Richard D. Courson had, during his lifetime, been desirous of paying off the widow's dower, or at least that part of it to which the witness was entitled after her death, but conceiving that it could not be done, the offer was declined, and Courson did not pay him his share, or any part of it. On being asked, on his cross-examination, whether John Bye had ever promised to pay it to him, he answered, that he had no concern with John Bye, and that after his mother's death, he had assigned his interest in writing. An assignment from Joseph Pidcock to Isaac Closson, dated the 1st of July, 1817, was then produced and read.

The defendant's counsel requested the court to charge the jury as follows:

First. It is the duty of the party alleging matter specially in his declaration, to prove substantially the matter laid in it, or he cannot recover.

Second. That if the jury believe that anything is due to Joseph Pidcock or to Isaac Closson in his right, the action cannot be sustained as brought against John Bye, under the evidence in the cause, as he could only be liable in right of his wife, in respect of the land, and a verdict and judgment in this case would charge him personally and his estate.

[*188] **Third.* That if a personal action can be maintained, it is an action of covenant on the articles of agreement between Richard D. Courson and Joseph Pidcock, or an action of *assumpsit* against Richard D. Courson's personal representatives, for the remainder of the unpaid purchase-money.

His honour, after having stated the case to the jury, charged them to the following effect: That the dividends of the other children of Benjamin Pidcock, to which they were entitled after

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their mother's death, were charged on the land in the hands of their brother Joseph, and it might have been reached in an action against him on his bonds, but his own share was not charged, by virtue of the proceedings in the Orphans' Court, because the money being in his hands, would be paid to him at his mother's death, by operation of law: That when he sold the land, he might let a sum, to the amount of his own share, remain in the hands of the purchaser, and charge it on the land, in his own favour, as between him and the purchaser, and this, it appeared by the evidence, he had done; and at his mother's death he was entitled to come on the land in the hands of Richard D. Courson, or any one standing in his place, for his share of the principal of his mother's thirds; it being so much of the principal withheld by Courson, to answer the annual interest payable to the widow: That he might also have maintained an action of covenant, to charge Courson personally, and whatever remedy he might have had, Closson, his assignee, was entitled to, in his name: That the interest to the widow had all been paid, as well as their shares of the principal to the other children, so that the question was, what was the proper remedy to recover the share of Joseph: That the plaintiff contended, that the defendant was personally liable, there being, as it was said, evidence of an express promise, and to show this, the partial payments to Closson were relied on; but his honour did not think this sufficient evidence of a promise to any one, and certainly not of a promise to Joseph Pidcock, as laid in the declaration: That the position contended for by the defendant, that the remedy was by action against the administrators of Benjamin Pidcock was untenable, the charge not having been created by him: That the remedy would clearly not be in a court of law, but a court of chancery, if we had one, to raise the money out of the land by a sale; but having no court of chancery, we are compelled, sometimes, to prevent a failure of justice, to make a common law action perform the office of a bill in equity, and it seemed to his honour, an action in the present form would answer the intent as well as any other that could be devised, the jury taking care not to make the defendant personally liable, but liable only so far as was necessary to give the plaintiff judgment and execution against the land: That he was sensible this was a new case, and did not mean to commit his opinion conclusively on the subject, but only so far as was necessary to present the question for final adjudication by the Supreme Court.

Under this charge, the jury found a verdict in favour of the plaintiff *for four hundred and fifty-eight dollars and eighteen cents, due by the defendant, not personally, [*189] but in respect of the land.

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A motion for a new trial, and in arrest of judgment having been overruled, the court ordered judgment *de terris* to be entered, from which the defendant appealed for the following reasons, viz. :

Reasons for a new trial.

First. That the evidence did not support either count in the declaration.

Second. That under the evidence there could be no recovery against the defendant in an action of *assumpsit*, there being no proof of an express promise, and no evidence from which one could be implied.

Third. That the chief justice erred, in not affirming in his charge to the jury, the points propounded by the defendant's counsel.

Fourth. That there was error in charging the jury that an action of *assumpsit* would answer, to supply the place of a bill in equity, and that the jury ought to find a verdict against the defendant for what they believed to be due to the plaintiff; and to be recovered of the land only, and not to charge the defendant personally.

Fifth. That no such verdict could be rendered in an action of *assumpsit*, as that found by the jury; and no judgment could be entered, or execution issued thereon.

Sixth. That the jury having, by their finding, negatived all idea of a promise, either express or implied, or any personal liability, the verdict should have been for the defendant.

Seventh. That the verdict is contrary to law.

Reasons in arrest of judgment.

First. That the facts set forth in the declaration, do not warrant a judgment against the defendant.

Second. That the verdict of the jury having expressly negatived all idea of a personal responsibility, no judgment can be entered on their finding.

Third. That no judgment can be rendered on the finding of the jury; the finding not being such an one as is warranted in the action of *assumpsit*.

J. M. Porter for the appellant, argued, that the evidence did not support the declaration in several respects. The conditions of sale do not correspond with the manner in which they are set out. In the declaration it is averred, that the deed of the 1st of April, 1801, from Joseph Pidcock to Richard D. Courson, disposed of the principal of the dower, after the death of the widow, which was not the case. The land, too, is subject to a rent charge, created by the will of James Logan, and payable to the Loganian library, as to which the declaration is silent.

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Another discrepancy is, that in the declaration it is stated, that the deed from Richard D. Courson and wife to John Bye and wife, conveys the land subject to the dower, which is contradicted *by the deed itself. *Cooper v. Jordan*, 3 Serg. & Rawle, 577, 580, 581; *Phillips v. Rose*, 8 Johns. R. [*190] 306; *Jones v. Moore*, 5 Binn. 573; 1 Chitty Pl. 302; *Lent v. Padelford*, 10 Mass. R. 230; *Anderson v. Hayes*, 2 Yeates, 95.

This was an action of *assumpsit*, and there was no proof of a promise, express or implied. Joseph Pidcock was called by us to prove that the whole matter was settled. He failed to do so; but he proved what was sufficient for our purpose, viz.: that there was no promise on the part of Bye to pay the money. It is settled, that the land is the debtor, and not the person. The declaration avers that the defendant promised, and the verdict finds that he did not promise personally. How can such a verdict be supported upon such a declaration? An action to recover a legacy cannot be supported against a devisee and terre tenant without an express promise. *Brown v. Furer*, 4 Serg. & Rawle, 213; *Gause v. Wiley*, 4 Serg. & Rawle, 509; *Nailer v. Stanley*, 10 Serg. & Rawle, 450. The effect of the finding in this case, is to bind the defendant personally. It can be in no other way in *assumpsit*. This would be highly unjust, for he is bound only in right of his wife, and if he were to die, his estate must be answerable for a debt not his own. The action would not lie against the defendant and his wife, because she was incapable of contracting, and *assumpsit* is always founded on contract. We did not come prepared to meet a proceeding *in rem*, of which the declaration gave us no notice, but a case of personal contract which the plaintiff declared upon, and which the jury have negatived. If the Loganian library should re-enter for non-payment of their ground rent, surely Bye would not be responsible for that; yet such would be the result if this verdict can be supported. *Bruch v. Porter*, 2 Rawle, 416. The court must adhere to established precedents, and Chief Justice Gibson said in *Barnet v. Ihrie*, 1 Rawle, 52, that it was decisive against the writ adopted in that case, that it was not to be found in the Register, and that the court did not possess the power to depart from established forms. Applying what is there said to the present case, the court has no right to adopt a remedy unknown to the law. The common law, it is true, is very elastic, and may be stretched as occasion requires, but not to its own destruction. To do what is now required will completely change the nature of the action of *assumpsit*, and call for an execution different from any heretofore known in such an action. A new execution must be framed, and that, this court has declared they have no right to do. The land, in this case, is the debtor,

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and no personal *assumpsit* by the possessor of it can be implied. An action of debt might perhaps have been sustained, but not of *assumpsit*. Stat. 22, E. 3; Rol. Dig. 158; Howell v. Price, 1 P. Wms. 294; Evelyn v. Evelyn, 2 P. Wms. 664.

In support of the reasons in arrest of judgment, all of which he considered together, Mr. Porter cited Stephens on Pleading, 117; Beecker v. Beecker, 7 Johns. Rep. 99.

[*191] *Kittera, contra, said, that several remedies had already been resorted to in vain, and if this did not succeed, the case presented an anomaly in the law; a clear right without a remedy. In the absence of a court of chancery, what common law remedy, or what mode of pleading was better calculated to present the case fairly and fully, it is difficult to imagine. It is said, the action should have been debt. But that form would not have given the defendant more effectual notice of what he had to meet, than the form adopted. It is then a mere question of the form of the action, and has nothing to do with substance. The money sought to be recovered was part of the purchase-money of the estate, and was not like a legacy charged upon land, where the purchaser takes the land subject to the charge. Bye is clearly bound to pay this money, and the time and manner of paying it was agreed by the parties. It remained in his hands until the time for paying over should arrive. It is, therefore, clearly a case of money had and received by the defendant to the use of those entitled to it, to be paid on the death of the widow. All the parties acquiesced except Joseph Bye, who was represented by his assignee Closson, for whose use the action is brought, and who manifested his assent by the receipt of the interest and part of the principal. If there be error in the judgment, it is against the plaintiff, for it has been entered so as only to bind the land, when the defendant was personally bound also. The opposite argument has gone on the supposed analogy between this case and that of a legacy charged on land, which it does not resemble. But the principles of the cases referred to respecting legacies charged on land, support the present action. To recover a legacy, the suit must be against the devisee or terre tenant, and the executor must be joined, or at least notice be given to him in order that the creditors of the testator, through the executor, may have an opportunity of defending their interests, because no one can claim a legacy until the debts of the testator are paid. This is not the case of a terre tenant, but of one, who, by his own agreement, takes the land subject to the charge, which he thus virtually promises to pay. It is equitable that he should pay it, and equity is the basis of the action of *assumpsit*; Nailer v. Stanley, 10 Serg. & Rawle, 450. *Assumpsit*

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will lie for a legacy charged upon land, 1 Chitty Plead. 90, and *a fortiori*, it will in a case like this. When a party takes land charged, it amounts to an express promise, Van Orden v. Van Orden, 10 Johns. 30. Darnforth v. Schoharie & Duanesburg Turnpike Co., 12 Johns. R. 227; Goodwin v. Gilbert, 9 Mass. Rep. 510. It was not necessary, that the promise should have been made to the plaintiff himself. If made to another for his benefit, it is enough. 1 Bro. Ab. 271.

The declaration is said to be erroneous in not setting forth correctly the instrument referred to. The rule is, that it is only necessary to state the legal effect, and courts always disapprove of stuffing declarations with unnecessary matter. One objection is, that the deed is set forth as if the money were payable on the death of the widow. *It was unnecessary to state the deed at all, but being introduced, it must be correctly [*192] stated, and it was so, because such was its legal effect.

The answer to the argument, that the court will be obliged to frame a new execution to suit this case is, that they are obliged to do so constantly. It forms part of the chancery powers of the court, without which there would often be a failure of justice. If established forms can alone be resorted to, the business of the courts must stop. Where there is an established form suitable to the case, the court will adhere to it, but where no remedy can be found appropriate to the right, the court must devise one.

Reply.—The case in 10 Johns. Rep. 30, does not resemble this. There the person charged was the original devisee, who took the land subject to the burthen, and was bound to pay the money. There the defendant was merely tenant by the curtesy initiate of the land of his wife. The land was the debtor and not he. In the case cited from 12 Johns. Rep. 227, the point was not made, that the action should have been covenant. The only point decided was, that *assumpsit* will not lie against a corporation. The case cited from 9 Mass. Rep. 510, affords no inference in favour of this case. It was the case of a deed poll, and not an indenture. There was no mutuality, and *assumpsit* was the only remedy. Here there was a plain remedy by action of covenant against the executors of Courson. The cases cited in 1 Chitty on Plead. 90, are all cases of express promises to pay a legacy, and therefore do not apply. Equity is truly said in Nailer v. Stanley to be the basis of the action of *assumpsit*; but Judge Duncan, in that case says, that *assumpsit* would charge the person and not the land. This court has said, it is conclusive against a writ that it is not to be found in the Register. If this decision be not adhered to, great mischief will ensue from uncertainty, as to what the law is.

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The opinion of the court was delivered by

HUSTON, J.—The pleadings and evidence presented the following case. Benjamin Pidcock died in 1789, seised of certain lands in Solebury township, Bucks county, and leaving several children, and a widow. In 1800, the children of Benjamin Pidcock proceeded according to law, to have the lands late of Benjamin Pidcock, divided, among them or appraised. They were appraised, and one of the tracts valued at nine hundred and eighty-two pounds one shilling and four pence, was taken at the appraisement by Joseph Pidcock, the oldest son, who gave bond and sureties to pay the widow nineteen pounds twelve shillings and nine pence three farthing per annum during her life, and to pay the principal sum of three hundred and twenty-seven pounds seven shillings and one penny half-penny to the heirs at her death. Sometime after this, (and the dates are very inaccurate in the paper-book,) Joseph Pidcock advertised the tract so taken by him, for sale at public vendue, among the conditions of which [*193] sale was one, that the land was to be taken subject to one *third of the valuation above mentioned, and the interest to be paid to the widow during her life, and the principal to be paid at her death. The land was bought by Richard D. Courson, for one thousand three hundred and ten pounds, and the said Richard D. Courson signed the conditions of sale, and put his seal to them, agreeing that he was the purchaser, and engaging to comply with the terms. Joseph Pidcock executed a deed to Courson. This deed recited the death of Benjamin Courson, &c., &c., as fully as above stated, in every particular, and granted the lands, &c., &c., to have and to hold them subject to the said one-third, specifying the sum, he to pay the interest to the widow during her life; but this part did not state, that he was to pay the principal at her death. Richard D. Courson entered and held these lands till his death in 1815, during all which time he paid the widow the stipulated sum. Richard D. Courson left issue, R. D. Courson and Hannah, the wife of the defendant, and left the tract of land in question and another tract of land. On a petition to the Orphans' Court, the lands were valued by an inquest. In this stage of the matter, Richard D. Courson and Bye and wife agreed, that Courson should take the one tract at the appraised price, and Bye and wife should take the one bought from Pidcock. The deed of partition, and release from Richard D. Courson, recited, that the tract had been valued by the inquest as subject to the yearly payment to the widow of Benjamin Pidcock, and the payment of the principal sum to the heirs of Pidcock after the death of the said widow. It also recited, that the said tract was subject to certain rents to the Loganian library, and then it proceeded to convey all the

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right and interest of the said Richard D. Courson to the said John Bye and Hannah his wife, and the heirs of the said Hannah, to have and to hold the same subject to all the recited incumbrances, &c., &c., as Richard D. Courson held the same in his lifetime; and John Bye and wife released and conveyed the other tract of the said Richard D. Courson. The narr. stated all these proceedings in the Orphans' Court minutely, and the substance of the deeds and release to them as recorded; and then proceeded to state, that by virtue thereof the said John Bye became seized of the said tract of land, and entered into possession thereof, and thereby became chargeable and liable to pay the said annual rent or sum to Sarah Pidcock, the widow, viz., the sum of, &c., and on her death, the principal sum to, &c., &c. That the said Sarah Pidcock, the widow, died on 11th May, 1818, of which the said John Bye had notice, and in consideration of the premises, and of his assumptions and engagements aforesaid, afterwards faithfully promised to pay the said principal sum of eight hundred and seventy-three dollars to the said Joseph Pidcock: Nevertheless he hath not paid, except the sum of one hundred and nineteen dollars in the year 1820, but hath refused; and a count for money had and received.

At the trial objections were made to the whole action, and to the narr. or parts of it. A verdict was taken finding for the *plaintiff four hundred and fifty-six dollars and eighteen [*194] cents, not against the defendant personally, but in respect of the land; and judgment *de terris*, and an appeal.

In this court, the defendant alleged, that the deeds were not set out fully enough; that the substance was not set out, or in other words, that when Richard D. Courson bought, and when partition was made between Richard D. Courson and Bye in each of which deeds, it was distinctly recited, that the land was granted subject to the payment of the interest to the widow, and of the principal at her death, there was no express engagement by the grantee to pay the one or the other. This was not much urged and could not be in a court, where the substance and real meaning of a deed is the criterion of its effect. In every one of the papers from the terms of sale, it was somewhere stated, that this tract was subject to this incumbrance, and well understood so to be by the defendant, and the engagement to pay it, or that whoever got the land must pay it, was more than implied. This incumbrance was part of the consideration given for it in all the transfers. This is not all; by express act of assembly the widow's thirds remained during her life charged on the land, and the interest thereof to be annually paid by the child taking the same, his heirs or assigns holding the

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same, to be recovered by the widow by distress or otherwise; and at the decease of the mother, the principal sum shall be paid by the child, who took the same at the valuation, or by his or her heirs or assigns holding the same premises, and shall be distributed, &c. That the money must be recovered then, was not denied, but it was said not in this form of action. No other was designated as better adapted, except that it was said, that formerly ejectment had been brought in such cases, and it was said, such an action did not lie in England or New York, except on an express promise.

It may be admitted, that no such action is to be found in any country, where they have a court of chancery. That is no reason why we should not sustain it; and 1 Rawle, 52, *Barnet v. Ihrie*, was cited to prove, that this court would not change the form of writs. I admit it, where a known action is used to obtain a long known remedy, but where we are obliged to use a known form of action to enforce what in other countries would be enforced in equity courts, we have adopted conditional verdicts in many cases, and if necessary in such cases, we may, and must mould our judgments and executions to suit the case. In some states chancery issues a *feri facias* why may not we give a special judgment to affect only certain lands, and issue a *feri facias* to levy on those lands alone; we do so on a mortgage, and on a judgment in debt on a recognisance against a conusor and terre tenant. See 7 Serg. & Rawle, 1.

It was intimated, that although there might be a judgment *de terris* in *scire facias* or debt on a recognisance, yet this could not be in *assumpsit*; that it might be, perhaps, if this suit had been in debt, but not in the present form. There are many [*195] cases in which *you may bring debt or *assumpsit*, and I take this to be one. I do not like the idea, that our equitable powers are more extensive in one form of action than in another. If it were so, however, it would be strange, if they did not exist in a form which has been emphatically called an equitable action, and did exist in actions which were originally, and yet in some countries are, more strictly legal.

The act of assembly and the agreements of the parties make this a charge on this land. The defendant knew of the charge, and took the land subject to it; it was in fact part of the price to be paid for it; there was in the whole transaction a consideration to the defendant, and express agreement to pay it to those entitled. Those entitled can, by many authorities, support *assumpsit*, but the act of assembly fixes it on the land, and the agreement to pay was in consequence of his getting the land, and the suit is against him expressly as having entered on, and being seized of the land.

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The same objections or stronger could have been made to any other form of action. It then comes to this, that the plaintiff has a right to this money, and the defendant is bound to pay it. In England the remedy would be in chancery; we have no chancery; can or cannot we give redress? The opinion of the court is, we can, and that in the present suit.

Judgment affirmed.

Cited by Counsel, 4 R. 444; 1 Wh. 300; 4 Wh. 460; 5 Wh. 458; 7 W. 157; 8 W. 49; 3 W. & S. 33; 7 W. & S. 274; 8 W. & S. 160; 1 Barr, 125; 5 C. 416; 2 S. 278; 13 W. N. C. 10.

Commented on and explained, 8 W. & S. 400.

Cited by the Court, 2 Wh. 150; 8 W. 299; 2 W. & S. 399; 11 Wr. 410.

Although *assumpsit* will lie, debt is the proper remedy: 7 S. 128.

[PHILADELPHIA, APRIL 2, 1831.]

Case of the Road in the Borough of Easton.

The Quarter Sessions of Northampton county, has no jurisdiction in laying out roads within the limits of the borough of Easton.

ON the return of a writ of *certiorari* to the Court of Quarter Sessions of Northampton county, it appeared that a petition was presented to that court, at its session in November, 1828, by divers inhabitants of the borough of Easton, setting forth that they "laboured under great inconvenience for want of a road or highway, to lead from the north termination of Front or Water street, in the said borough, by the nearest and best route to intersect the road leading from the said borough, along the Delaware, to John Sandt's tavern." Viewers were accordingly appointed, who reported in favour of the road. On the application of adverse petitioners, reviewers were appointed, who reported against the road. The report was made to the August sessions, 1829, and at the same sessions, a petition was presented, praying for a re-review, which was granted. At the November *sessions, 1829, the re-reviewers made a report in favour [*196] of the road.

To this report, four exceptions were filed in the Court of Quarter Sessions, of which it is now necessary to notice only the last, which was as follows, viz.:

"The Court of Quarter Sessions had no jurisdiction in the matter, the road laid out being entirely within the limits of the borough of Easton."

On the 26th of January, 1830, the Court of Quarter Sessions

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quashed the proceedings, for the reason assigned in this exception, without giving any opinion upon the other exceptions.

The opinion of the court was delivered by

Ross, J.—This case comes before the court on a *certiorari* to the Court of Quarter Sessions of Northampton county. The Court of Quarter Sessions, on exceptions filed, decided that they had no jurisdiction of the matter. Conceiving that the road laid out by the viewers appointed for that purpose, was entirely within the limits of the borough of Easton, they, on the 26th of January, 1830, quashed the proceedings. The complainants have assigned, for error, that the court erred in supposing that they had no jurisdiction in laying out roads within the limits of the borough. The only question, therefore, presented for the determination of this court, is, whether the Court of Quarter Sessions has been divested of such jurisdiction by the charter of incorporation.

The town of Easton was first incorporated by the act of the 23d of September, 1789. No provision was contained in this act, to prevent the Quarter Sessions laying out roads within the limits of the borough; but by an act of the 19th of March, 1828, enacted upon the application of the inhabitants, the former act was entirely altered and changed, except as respects the extent of the boundaries. By the 17th section thereof, it is provided, that “so much of the act entitled an act for erecting the town of Easton, in the county of Northampton, into a borough, and for other purposes, therein mentioned, and of the general road law, as may have heretofore authorized the election of supervisors, and the assessing and collecting of road taxes within the said borough, and of any other acts of assembly as are altered, or supplied, or amended by this act, be, and the same is hereby repealed.” This section repeals, in express words, the power of the Court of Quarter Sessions to appoint viewers, and to lay out roads within the borough, only so far as the exercise of that power is supplied, altered, or amended by the provisions of the act of incorporation. How far, then, are the provisions of this act inconsistent with the provisions of the general road law? It appears to me, from an attentive consideration of the act, that it is so far inconsistent with the provisions of the road law, as in effect to repeal that law within the borough of Easton. By the

[*197] 14th section of the act, the town council *are directed to cause an accurate survey of the public square, and of the several roads, streets, lanes, and alleys within the said borough, to be made, and drafts thereof to be made and recorded; and on hearing any objection which may be made by any inhabitant, being a qualified voter of said borough, on some day

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appointed for that purpose, shall adjudge and determine whether any, and what alterations shall be made therein, and shall direct one of the drafts or plans, authenticated by the chief burgess and town clerk, under the seal of the corporation, to be recorded, &c., and thenceforth the public square, and all the streets, roads, lanes, and alleys therein contained, shall be forever deemed, adjudged, and taken as public highways, and the said survey so returned and recorded, shall remain unalterable. This survey has been made and returned. Thus the town council were authorized to decide whether any alteration was necessary in the roads, before making a return of the survey and draft, which was directed to be made and recorded. The decision of the council, when once made, was to be unalterable. The Court of Quarter Sessions was thus restricted from exercising any control over the same. This was essential to the peace and prosperity of the borough. They, who were intrusted to exercise the power of making an accurate survey and draft of the several roads, streets, &c., requisite for the accommodation of the citizens, were certainly more competent to judge and decide, than a view appointed by the court from the adjacent townships. An unalterable plan, with the necessary streets, &c., was calculated to give stability to the rights of property, and to create a confidence in the owners thereof, that they might with safety improve the same, without the danger of innovations and alterations so destructive of their best interests.

That this court is right in their construction of this act, is still further evident from an examination of the other sections of it. By the seventh section, the town council are invested with the power of appointing street and road commissioners, of improving, repairing, and keeping in order and regulating the streets, roads, lanes, alleys, and highways, and with power to assess, apportion, and appropriate such taxes, as shall be necessary for carrying the rules and ordinances into complete effect. And by the twelfth section, an appeal from the assessment may be made to the chief burgess and two qualified voters, being inhabitants of the borough, who are authorized to remedy any grievance, that may occur in imposing the tax. The provisions of these sections are all inconsistent with the general road law: not only the power of appointing road commissioners, and of keeping in order and regulating the streets, but also the mode of assessing and collecting the taxes, are in direct opposition to the provisions of the road law. So also is the fifth section, (which imposes a fine on the commissioners who refuse to act,) in opposition to the road law. The section authorizes the making of such by-laws and ordinances as may be necessary to promote the

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[*198] peace, good order, benefit, and *advantage of the said borough, particularly for the improving, repairing, and keeping in order, and regulating the streets, roads, lanes, alleys, and highways. It is evident from these sections, that it was the intention of the framers of this act of incorporation to invest the officers of the borough with exclusive power over the streets, &c. The court of Quarter Sessions has been divested of its jurisdiction. There is, in fact, no supervisor to whom they could issue an order for opening a road. The council have the entire control over the street commissioners, and I do not see by what authority the Quarter Sessions could issue their order to them. The case of the road in the borough of Mercer, 14 Serg. & Rawle, 447, which has been cited, depended upon an act of incorporation, entirely different, in most of its provisions. There is no power given to appoint a street commissioner vested with as extensive authority as in the act of the borough of Easton: and moreover, the Mercer act of incorporation, contains a proviso, that nothing contained in that act should be repugnant to the laws of the commonwealth; whereas the seventeenth section of the borough act of Easton, repeals in express words the general road law, so far as it is altered or supplied by the act of incorporation. The case of the Mercer road differs in many other respects.

It is the policy of towns with a dense and increasing population, to invest their officers with an exclusive control over their streets; and also to have recorded, as in this case, an unalterable draft of all the roads and streets within the borough. Such a feature in an act of incorporation is conducive to the peace and prosperity of the town. It is indeed high time that many of our boroughs should adopt a similar provision, and prevent any new streets or roads being made without the consent of the owners of the ground was first obtained, and a purchase made by those persons interested in the new road or street. They might then sit quietly down under their own vine and their own fig tree, and have none to make them afraid.

The opinion of the court is, that the proceedings in this case must be confirmed.

HUSTON, J.—The only question in this case is, had the Court of Quarter Sessions power to lay out a road through the outlots in the borough of Easton: and it would seem that was settled by this court in 14 Serg. & Rawle, 447. The counsel attempted to distinguish this case from that, by showing that some clauses in the act incorporating Easton, differed from those erecting Mercer into a borough. The difference does not appear to me material. The seventeenth section of this act authorizes the court

[Easton Road Case.]

to appoint street and road commissioners, and improve, repair, and regulate the streets, &c., &c. The same power, in words equally strong, was given to the corporation of Mercer. There is here, however, in section fourteenth, a provision that a draft of the public square, and of all streets, lanes, and alleys, shall be made, and two copies filed in different offices, and that those so designated shall remain forever. This relates solely to streets, *lanes, and alleys then in existence; but not a word is [*199] said about such as might thereafter be deemed necessary. But the seventeenth section repeals the road law so far as relates to the election of supervisors, and the assessing taxes; so did the act incorporating Mercer; not in express terms, but by directing an entirely different mode of appointment and of assessment.

That case was fully considered; it was known that out-lots adjoined the town plot of almost every borough in this state, and that those out-lots were generally included within the bounds of the borough; that as the population of the town and country increased, additional roads became necessary, and had been laid out and considered, and were public roads.

The power given to the Quarter Sessions is general: the words embrace the whole state. It is modified by directing more viewers, and greater solemnity, in this city and the incorporated parts of this county, but still is left in the Quarter Sessions. We agree with the case decided, that the Quarter Sessions had the power to lay out this road, and the decision of the Quarter Sessions of Northampton county is reversed, and the case sent back to be proceeded in according to law.

Decision of the Quarter Sessions affirmed.

Cited by Counsel, 1 Wh. 42; 10 W. 351; 4 Barr. 304; 1 H. 558.

Under the general road law the Quarter Sessions has jurisdiction to lay out roads, and this power cannot be taken from that court by any local legislation unless, as in this case, exclusive language is used. 8 W. 175; 8 Barr. 91; 8 C. 363; 24 S. 63.

[PHILADELPHIA, APRIL 2, 1831.]

Krause, Assignee of Moll, *against* Beitel and Another.

IN ERROR.

Testator, after giving certain portions of his real estate to certain of his children at a valuation, and declaring, that in case it was refused by all his children, it should be sold by his executors, and that all his estate or the value thereof should be equally divided among his ten children, naming his seven sons and three daughters, all three of which daughters were married women, proceeded, "and if one or the other of my children should depart this life,

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then his bequest or legacy shall come to the heirs of his body." Held, that the bequest to the daughters was not to their separate use, but passed to their respective husbands.

The interest of a trustee of an insolvent debtor, in the debts of the insolvent, is exactly that of the insolvent himself, as they stood affected by countervailing equities, at the time of the assignment.

Where, therefore, a trustee brought suit against two administrators with the will annexed, to recover a legacy given to the insolvent's wife, it was held to be a good defence, that one of the defendants had actually paid a debt for the insolvent before his discharge, and had been sued for another debt, which he had since been compelled to pay.

WRIT of error to the Court of Common Pleas of *Lehigh* county.

In this action of *assumpsit*, in which the plaintiff in error, [200] John J. *Krause, assignee of John Moll, for the use of the creditors of the said John Moll, was plaintiff below, and the defendants in error, Christian F. Beitel and Frederick Newhardt, were defendants, a case was stated for the opinion of the court below, which it was agreed should be considered as a special verdict. In substance it was as follows :

Lorentz Newhardt, on the 28th of December, 1815, made his will, which after his death, viz.: on the 8th of August, 1817, was duly proved, by which, after devising certain portions of his real estate to certain of his children, and affixing a value to some of those portions, he declared, that if any of his children should refuse to accept the property at the value he had affixed to it, then the eldest son should be entitled to take it, and if he refused the next, and so on to the youngest; and if all the sons refused it, the same right should devolve upon the daughters in succession, according to their respective ages; and if all the children should refuse it, at the valuation, he directed that his executors should sell it. He then proceeded, "And all my estate, or the value thereof, shall be equally divided amongst my ten children, to wit, Frederick, Christian, John Jacob, Peter, John David, Daniel, Elizabeth (the wife of John Moll,) Anna Maria (the wife of Daniel Yunt,) and Salome (the wife of George Yunt,) and if one or the other of my children should depart this life, then his bequest or legacy shall come to the heirs of his body." The testator appointed his son Frederick, and his son-in-law John Moll, his executors.

On the eighth of September, 1820, the said executors were dismissed from their trust, and letters of administration with the will annexed, were issued to Frederick Newhardt and Christian F. Beitel.

On the fourth of December, 1820, John Moll was discharged under the insolvent laws, and on the sixth of February, 1826, John J. Krause, his assignee, gave bond, which was approved by the court.

[Krause v. Beitel and others.]

After payment of debts and specified legacies, there remained in the hands of the defendants as administrators of the deceased, from the valuation and proceeds of his lands, in money and securities, the sum of ——— dollars, of which sum the proportion of the cash bequeathed to Elizabeth Moll the wife of John Moll, was two hundred and sixty-eight dollars and seventeen cents. From the time letters of administration were granted to Frederick Newhardt and Christian F. Beitel, the moneys of the estate were paid into the hands of Christian F. Beitel, who had the papers of the estate in his charge, or possession, or who yet retained in his hands the said sum of two hundred and sixty-eight dollars and seventeen cents; but he always consulted and confederated with his co-administrator, Frederick Newhardt, in relation to all the affairs of the administration. John Moll and Elizabeth his wife were both in full life at the time the action was brought, and had six children living.

On the 27th of November, 1816, John Moll and Frederick Newhardt executed their joint single bill to John Biery for the payment of one hundred and fifty dollars, on demand, with interest from the date. Frederick Newhardt was the surety, and John Moll alone *beneficially interested in the said bill. [*201] Suit was brought on the said bill, and judgment obtained in the Court of Common Pleas of Lehigh county, on the 19th of April, 1820, for one hundred and sixty-six dollars and fifty-seven cents. On the 2d of December, 1820, George Yunt lent to Frederick Newhardt, and paid to Biery for him, one hundred and seventy-two dollars and seventeen cents, the principal and interest due on the said judgment, of which he took an assignment; the costs, amounting to eight dollars, were also advanced to him by Yunt. At the same time, as an additional security to Yunt for his advancement, Newhardt pledged to him a bond given by John Jacob Newhardt to Frederick Newhardt and John Moll, executors of Lorentz Newhardt deceased, dated July 31, 1820, in the penalty of two hundred pounds, conditioned for the payment of one hundred pounds on the 15th of August then next, being money belonging to the estate of the said Lorentz Newhardt, which bond was received by the said Frederick Newhardt from the said Christian F. Beitel, one of the administrators, with the will annexed of the deceased, as part of the legacy bequeathed by the deceased to the said Frederick Newhardt, and came into the hands of Beitel, as one of the administrators, with the will annexed of the deceased.

In the month of March or April, 1821, Yunt purchased the said Frederick Newhardt's plantation in South Whitehall township, for fourteen hundred dollars; six hundred payable down, and the residue in payments of one hundred dollars each; and

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on the 4th of June, 1821, Yunt reassigned to Frederick Newhardt the said bond, as and for one hundred and eighty dollars cash, and it was accepted by Newhardt as so much on account of the first payment. Afterwards Yunt received, as agent of Newhardt, from John Jacob Newhardt, several sums of money, amounting together to one hundred and ninety-six dollars and eighty cents, for which receipts were indorsed on the bond. The money thus received was paid over by Yunt to Newhardt, as he received it. The sum of sixteen dollars and forty cents was afterwards, viz., on the 7th of February, 1824, received by Frederick Newhardt himself from John Jacob Newhardt.

On the 8th of August, 1820, Frederick Newhardt indorsed for the accommodation of John Moll, his promissory note of that date for one hundred and seventy dollars, payable sixty days after date to the order of the said Frederick Newhardt at the Northampton Bank, which was discounted at the said bank, and the proceeds carried to the credit of the said John Moll. On the 10th of October, 1820, the said note was protested for non-payment. Suit was brought upon it by the bank, who on the 5th of January, 1821, obtained a judgment against the said Frederick Newhardt, who on the 16th March, 1826, paid one hundred and fifteen dollars and twenty-eight cents to the cashier of the bank on account of the judgment.

The said sum of one hundred and eighty dollars and seventeen cents, with interest from the 2d of December, 1820, and the said sum of one hundred and fifteen dollars and twenty-eight [*202] cents, with interest *from 16th March, 1826, were still due to the said Frederick Newhardt, and were claimed to be set off against the plaintiff's demand.

The question for the opinion of the court below was, whether in a suit by the trustee against the administrators with the will annexed, to recover the legacy bequeathed by the testator to the wife of the insolvent, the matters stated in the case as having taken place between John Moll, the insolvent, and Frederick Newhardt, one of the defendants, formed a set-off or equitable defence in favour of the defendants.

The court was of opinion, "that the liabilities contracted by Frederick Newhardt, before the assignment by John Moll to the plaintiff according to the case, having been discharged by the said Frederick Newhardt, before this action was brought, do, for the amount of moneys so paid by the said Frederick Newhardt for and on account of the said John Moll, furnish an equitable defence in this action according to the repeated decisions of the courts in Pennsylvania. And the court, therefore, upon the whole of the case stated, give judgment in favour of the defendants, each party to pay their own costs."

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The following errors were assigned in this court :—

First. The court erred in giving judgment, on the case stated, in favour of the defendants.

Second. The court erred in deciding, “that the liabilities contracted by Frederick Newhardt before the assignment by John Moll to the plaintiff, according to the case, having been discharged by Frederick Newhardt before this action was brought, did for the amount of moneys so paid by the said Frederick Newhardt for and on account of the said John Moll, furnish an equitable defence to this action.”

Third. The court should have given judgment for the plaintiff on the case stated, for the following, among other reasons :

1. That by the assignment executed by John Moll on the 4th day of December, A. D. 1820, the time when he was discharged under the insolvent laws, the right of John Moll to the legacy in question was divested from him, and vested immediately in his trustee.

2. That in order to constitute the subject of a set-off or defalcation under the 5th section of the act of 26th March, 1814, entitled “An Act for the relief of Insolvent Debtors,” there must have been mutual subsisting debts at the time of the discharge, upon which a recovery could then have been had.

3. That inasmuch as Frederick Newhardt was merely surety for John Moll to third persons for the matters stated in the case, which liabilities had not been discharged at the time of John Moll’s discharge as an insolvent debtor, but for which Moll was then liable to the original creditor, Frederick Newhardt had no subsisting debt against Moll at the time of the discharge, and therefore has no debt to defalcate.

4. That as between a debtor of an insolvent and the trustee under the insolvent laws, mutual credit, which alone [*203] existed in this case, is not the subject of defalcation in Pennsylvania.

5. That if any debt actually existed in favour of Frederick Newhardt against John Moll at the time of the assignment and discharge of Moll, it was a contingent debt, which is not the subject of defalcation in Pennsylvania.

6. That in an action against two to recover a debt jointly due by them, a separate demand due to one of them cannot be set off.

Brooke, for the plaintiff in error, cited act of 20th March, 1814, sec. 4, 5, *Purd. Dig.* 389 ; *Lessee of Willis v. Row*, 3 *Yeates*, 520 ; *Kennedy v. Ferris*, 5 *Serg. & Rawle*, 397 ; *Wickersham v. Nicholson*, 14 *Serg. & Rawle*, 118 ; *Babbington on Set-off*, 116, 117, 118 ; *Lighty v. Brenner*, 14 *Serg. & Rawle*, 132 ; 17 *Johns. Rep.* 113 ; *Perry v. Boileau*, 10 *Serg. & Rawle*,

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208 ; *Frost v. Carter*, 1 Johns. Ca. 73 ; 6 Johns. Ch. Rep. 286 ; *Buel v. Gordon*, 6 Johns. Rep. 126 ; Stat. 4 and 5 Ann. c. 17 ; Stat. 2 Geo. 2 ; c. 22 ; 3 Bl. Com. 154 ; *Marks & al. v. Barker & al.*, 1 Wash. C. C. Rep. 178 ; *Steigleman v. Jeffries*, 1 Serg. & Rawle, 477 ; *Heck v. Shener*, 4 Serg. & Rawle, 249 ; *Shaw v. Badger*, 12 Serg. & Rawle, 275 ; *Light v. Stoevers Ex'ors*, 12 Serg. & Rawle, 431.

J. M. Porter, for the defendants in error, combatted the positions taken by the counsel for the plaintiff in error, and contended further, that by the will of Lorentz Newhardt, the legacy given to his daughter, was for her sole and separate use, and that no interest in it vested in her husband John Moll, which he was capable of passing to his trustee under the insolvent laws. He cited *Lodge v. Hamilton*, 2 Serg. & Rawle, 49 ; *Ingraham on Insolvency*, 223, 227, 228 ; *Jamison v. Brady*, 6 Serg. & Rawle, 466 ; *Torbert v. Twining*, 1 Yeates, 432 ; *King v. Deihl*, 9 Serg. & Rawle, 409 ; *Scott v. Pine*, 2 Serg. & Rawle, 59 ; *Deihl v. King*, 6 Serg. & Rawle, 31 ; *Bitzer's Ex'or v. Hahn & Wife*, 6 Serg. & Rawle, 238 ; *Mifflin v. Neal*, 6 Serg. & Rawle, 460 ; *Ferree v. Commonwealth*, 8 Serg. & Rawle, 315.

The opinion of the court was delivered by

GIBSON, C. J.—Nothing in the will indicates an intent to limit the bequest in favour of Elizabeth Moll, to her separate use. The limitation to her heirs in case of her death was probably inserted to prevent the legacy from lapsing ; but it is manifest from its being used also in reference to the testator's sons, that it was not intended to control the marital rights of the husbands of his daughters.

The remaining point I take to be equally clear. As regards cross demands, the trustee of an insolvent estate, stands in a situation perhaps less, but certainly not more, favourable than that of any other assignee ; his interest in the insolvent's debts being exactly that of the insolvent himself as it stood affected by countervailing equities at the time of the assignment. The creditors are not purchasers in the first instance, and the trustee [*204] takes for their benefit, consequently *subject to all the rights which may grow out of the original transaction. It is immaterial, therefore, whether the liability set up as a defence were originally absolute or contingent, the relations of the parties being unalterable by the accidental insolvency of one of them. Here one of the defendants had actually paid a debt for the insolvent before his discharge, and was sued for another, which he has been compelled to pay since, and it conflicts with no provision of the legislature to allow the defendants the bene-

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fit of these payments, not perhaps as a set-off, but as a defence, that would be made available by a chancellor; as was held in *Frantz v. Brown*, (1 Penn. Rep. 261,) without the aid of any statutory provision whatever. We do not perceive, therefore, that the court below erred in doing substantially the same thing in an action at law.

Judgment affirmed.

Cited by Counsel, 1 Wh. 181, 5 Wh. 78; 7 W. 85; 9 W. 180; 3 W. & S. 281; 7 W. & S. 169; 2 Barr, 68; 3 Barr, 139; 6 Barr, 39; 7 C. 292; 8 C. 125; 26 S. 81; 14 W. N. C. 492.

Cited by the Court, 2 Wh. 246; 5 Wh. 116; 1 H. 528; 1 M. 228.

END OF MARCH TERM, 1831.—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1831.

[PHILADELPHIA, JANUARY, 1832.]

Case of Kreider's Estate.

APPEAL.

Though under the act of the 14th of April, 1828, supplementary to the act to compel assignees to settle their accounts, &c., it is necessary that an appeal to the Supreme Court should be filed at the next term after it is taken, yet if it be done during the actual session of the court, whether sitting by adjournment, or otherwise, it is in time.

CONRAD KREIDER together with his wife, having on the 7th of November, 1823, executed a voluntary assignment of his real and personal estate to Owen Rice and Jefferson K. Herberman, for the benefit of his creditors, under certain conditions expressed in the deed, the assignees on the 29th of November, 1828, agreeably to the provisions of the act of the 24th of March, 1818, and its supplement, presented to the Court of Common Pleas of Northampton county the accounts of their trusts, and the court directed thirty days' notice to be given by advertisements, that the accounts would be confirmed on the first day of the next term, unless cause should be shown to the contrary. On the 19th of January, 1829, the court appointed auditors "to examine and resettle the account, and make distribution of the balance, to and among the creditors," &c. The auditors, on the 27th of April, 1829, filed their report, which was confirmed *nisi*. On the 30th of the same month, exceptions to the report

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were filed, and a rule to *show cause why it should not be set aside, granted, and on the 28th of the following [*206] August the exceptions were dismissed, and the report confirmed. On the 17th of November, 1829, an appeal to the Supreme Court was taken by certain creditors, and bail entered; and on the 15th of January, 1830, the appeal was filed in this court. Whether the appeal was filed within the period prescribed by law, was the question to be determined by this court.

Brooke and J. M. Porter for the appellees, moved to quash the appeal, on the ground that it had not been filed within the period prescribed by law. They contended that according to the true construction of the sixth section of the act of the 14th of April, 1828, and decisions upon similar statutes, it should have been filed in this court by the first day of the term next ensuing its entry in the Common Pleas, or at all events before the last return day of the term.

December Term, 1829, commenced on the 8th of December, and by law, the regular term continued only three weeks. The 27th of that month was the last return day of the term, and all writs issued after that day, were returnable to March Term, 1830. The record was not taken from the office of the prothonotary of the Court of Common Pleas, until the 12th, and was filed in the office of the prothonotary of this court on the 15th of January, 1830. The appeal was taken and perfected below on the 17th of November, 1829, by making the affidavit and entering bail. The motion to quash was made on the first day of March Term. It is true the appellants need not have entered their appeal until the 15th of January, 1830, but having taken it on the 17th of November, they were bound to file it in the Supreme Court, before, or at least during the next term. In the analogous case of an appeal from the judgment of a justice of the peace, the appeal must be entered on the docket before the first day of the next term of the Court of Common Pleas. *Beale v. Dougherty*, 3 Binn. 432. It is important that the court should lay down a general rule for the government of future appeals, uninfluenced by the supposed hardship of this case. The appellants have certainly been guilty of neglect, by which the opposite party has been delayed

Scott, contra, said, that this was an important motion, and the first of the kind in Pennsylvania. The act of assembly upon which the proceeding is founded, gives the Court of Common Pleas peculiar and important powers, as great as those of a court of chancery in similar cases. It is therefore important in establishing a rule on the subject, that it should be done with due

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reflection. If the rule contended for on the opposite side be established, it will operate with great hardship on the appellants in this case. Both the counsel who were originally concerned, had been called to the exercise of important public duties, which was the reason why the appeal had not been entered earlier. It however was entered during the sitting of the court, though after the expiration of the regular term, and this was enough. If neglect is to be imputed to either party, it is to the appellees, [*207] who *did not make their motion to quash until March Term, although they might have made it at any time between the 15th of January, when the appeal was filed and the 24th of that month, when the court adjourned. An appeal from the judgment of a justice of the peace is not an analogous case, for the act of assembly giving that appeal, expressly requires it to be filed in the office of the prothonotary, on or before the first day of the next term of the Court of Common Pleas, and it was upon this legislative enactment that the case of *Beale v. Dougherty* was decided. The act giving the present appeal, contains no such provision.

The opinion of the court was delivered by

ROGERS, J.—The act of the 14th of April, 1828, allows an appeal, within one year after decree, sentence, or judgment. The question is, whether this be an appeal within the period prescribed by law; and we are all of the opinion that it is. The decree was made the 28th of August, 1829. On the 17th of November following, the appeal was taken, and bail entered, and on the 15th of January, 1830, it was duly filed. I agree, that it is incumbent on the appellant, to file his appeal at the next term, but if done during the actual session of the court, whether sitting by adjournment or otherwise, it is all the law requires. *Vanlear v. Vanlear*, 1 Binn. 76, and *Share v. Lytle*, 16 Serg. & Rawle, 9, were decided, on the words of the act of the 20th of March, 1799, which expressly directs the filing of the appeal, on or before the next term. In this, the analogy fails. If the peculiar circumstances of the case require an earlier entry of the appeal, the object of the appellee may be obtained on motion.

Rule discharged.

Cited by Counsel, 6 Barr, 352.
Cited by the Court, 4 R. 241.

[PHILADELPHIA, JANUARY 6, 1832.]

The Commonwealth *against* Brown.

Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town; though neither the prosecutor nor his family had ever lodged in the house, in which the crime is charged to have been committed, but merely visited it occasionally.

In an indictment for burglary, it is not necessary to charge the prisoner with having broken and entered the prosecutor's house *with an intent* to commit a felony therein.

THE prisoner, James Brown, was found guilty of burglary, at a court of Oyer and Terminer, held by the Chief Justice and Mr. Justice Ross, on the 27th November, 1830. His counsel moved for a new trial, and in arrest of judgment.

*"1st Because the verdict was against and without sufficient evidence in this; that the only evidence against [*208] the prisoner, of breaking and entering in the night time, was by his own confession, which was obtained from him by the constable, by holding out to him the hope of impunity.

"2d. Because the verdict was against law in this; that the house of the prosecutor was not his dwelling-house, nor one in which a burglary could, at the time of the alleged offence, have been committed.

"3d. Because the indictment does not charge the prisoner with having broken and entered the prosecutor's house, with intent to commit a felony therein."

At the trial it appeared, that Mr. Harvey, the prosecutor, was an inhabitant of the city of Philadelphia, but that at the period at which the offence was charged to have been committed, he had retired to a temporary residence in the country, having abandoned and advertised for sale the house in which he had previously resided in the city, and intending to return to another of which he was the owner, and to which he had removed his furniture. During his sojourn in the country, the house to which he had removed his furniture, with an intention to make it his residence on his return to the city, was occasionally visited by the family, thrown open and used as a stopping-place, precisely as his other town-house had been used during his summer retreat, in the preceding years, except that the furniture was not arranged or the house set in order for the permanent reception of the family. While thus situated, the house was broken and entered by the prisoner in the night time, and the goods stolen as charged in the indictment.

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These motions were now argued by *Haley* and *K. Smith*, for the prisoner, and by *Wurts* for the attorney-general.

On the part of the prisoner, it was argued, that the prosecutor not having begun to inhabit the house, as the family had never lodged in it, the act of breaking into it in the night time, and carrying away the goods, did not constitute the crime of burglary. Sergeant *Hawkins*, it is true, asserts, that the removal of part of the tenant's goods to a house intended to be inhabited by him, makes it his mansion, and the subject of burglary, but there is a *quere* affixed to the authority, which is cited in the margin, *Kelyng's Rep.* 46. And since the American Revolution, the point has been ruled otherwise in Westminster Hall. (To establish this, Mr. *Haley* offered to cite several British authorities, but was stopped by the court, because British decisions since 4th July, 1776, are not only declared not to be authority here, but even the citation of them is expressly forbidden by the act of 29th March, 1809.)

In arrest of judgment, it was argued, that the breaking and entering must be specially laid to have been with an intent to commit a felony. If there was no such intent at the time a felonious design conceived and executed afterwards, will not [*209] constitute a burglary. *In an indictment, nothing is to be taken by inference or intendment. All the essential parts of the offence must be positively charged. Hence it follows, that the intent to commit a felony at the time of breaking and entering, must be stated.

(The judges who tried the prisoner, having declared, that the exception to the evidence was not founded in fact, the constable having merely advised the prisoner to confess, without having made any promise of impunity, the remaining point was not argued.)

On the part of the Commonwealth it was answered, that *Hawkins* (himself a great authority) is express to the point, that a house occupied as this was, may be the subject of a burglary, and such was the law at the time of our revolution. The courts of this state would be still in a state of colonial independence, if they were bound to follow, against the declared will of the legislature, the wanderings of the British judges, through all their changes of the common law, without regard to the reason or policy of those changes. The change in this particular, was forced upon them by the sanguinary punishment annexed to the offence, but the same considerations of humanity do not plead for a correspondent change here, in consequence of the mitigated punishment prescribed by our mild penal code. A great amount of property is annually exposed to depredation by the absence of the families of its owners each summer, in search of health or

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pleasure, and sound policy demands a strict adherence to the common law as it stood at the period of our revolution.

In answer to the argument in support of the motion in arrest of judgment, it was said, that however plausible it might be in theory, it is sufficient, that the form of the indictment is in strict accordance with all the precedents, without a single exception.

The opinion of the court was delivered by

GIBSON, C. J.—As regards the point involved in the motion for a new trial, there is little doubt of the law at the period material to the question. “It is agreed by all,” says Sergeant Hawkins, “that a house wherein a man dwells but for a part of the year; or a house which one has hired to live in, and brought part of his goods into it, but has not yet lodged in, may be called his dwelling-house, and will sufficiently satisfy the words *domus mansionalis* in the indictment, whether any person were actually therein or not at the time of the offence.” (Hawk. P. C. B. 1 Ch. 38, § 18.) Otherwise, where the house is under repair, though part of the owner’s goods be deposited in it, for till he take possession with an intent to inhabit it, it is not his mansion or dwelling. (Ib. § 19.) It is certainly true, that the case referred to by Mr. Leach, the learned editor of Hawkins, is by no means decisive, and it is also true, as remarked by Mr. East, (Cr. Law, 497,) that the point has since been frequently ruled otherwise. But even the uncorroborated opinion of Sergeant Hawkins, whose Pleas of the Crown has long been the text-book of the profession, would be a safe foundation for a decision. What is there to prevent it from *being used [*210] as such here? Assuredly nothing but the determinations of the British courts since the declaration of our independence, and consequently nothing in the shape of precedent to which we are at liberty to pay respect, were we so disposed, further than it may seem entitled to it, for its intrinsic reason and good sense. Then even were we to lay Hawkins out of view, the case would come to us as one of the first impressions. Now, without denying the solidity of the principle, on which the modern English cases were decided, it is sufficient to say it is inapplicable to the case of the prisoner. In none of them was the residence of the prosecutor, actual or constructive, in the house, which was the subject of the alleged offence, as it does not appear, that he had abandoned his previous residence elsewhere. Now I readily grant that the law does not extend the privilege of the castle to more than one dwelling in the same place; consequently till the old dwelling be broken up, a new one cannot be acquired. What was the case here? In re-

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tiring to the country during the hot months, the prosecutor was not the less an inhabitant of Philadelphia, which undoubtedly continued to be the place of his domicil. He had permanently discontinued his residence in the house previously occupied by him; and unless the house to which he intended to return, and which was in the meantime used as his town house, be taken to be the place of his permanent residence, he must be considered as presenting the strange spectacle of an inhabitant without a habitation. As his domicil, it subjected him to the duties, and entitled him to the privileges and immunities of a citizen, in reference to the ward, in which it was situate, determining in this respect the place of exercising his right of suffrage, or of receiving notice, or a tender, or of transacting any matter or thing which might involve the question of residence. It was therefore his habitation, and his castle even in the absence of the family. Is lodging in the house evidence of habitation, or a constituent part of it? If it be the former, its place may be supplied by any other evidence equally satisfactory; and if it be the latter, it will be difficult to sustain those convictions that have frequently taken place, notwithstanding the temporary absence of the inmates at the time of the offence, as the quality of residence being rendered incomplete by the actual discontinuance of one of its essential parts, would cease as soon as the family had withdrawn. The propriety of these convictions, however, has never been questioned by any man, who made pretension to the character of a lawyer. Originally, no doubt, the principal ground of the offence was the invasion of the family retreat, when the inmates were in a state of repose, and consequently comparatively defenceless; but it is not the only one; else it would follow, that a house actually uninhabited, would be stripped of its peculiar sanctity by the accidental absence of the family; which, every sciolist knows, is not the law. As an authority for this, Sir John Nutbrown's Case, (*Foster, 76,*) is in point; and the principle is asserted in many other cases. Convictions of burglary, when the family were out of town, and when no person lodged in the house, have been of [*211] every day occurrence in the Courts of Oyer and Terminer here. Why then shall the house of the prosecutor here be less under the protection of the law than if the family had lodged a night in it previous to setting out on their summer excursion? Many inhabitants of our seaport towns shut up their houses as regularly as the summer comes; and thus leave a considerable mass of property peculiarly exposed to depredation, from which it surely cannot be sound policy to withdraw the protection of the law, when it is most needed. At the declaration of our independence the law would undoubtedly have

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been held here, as it is laid down by Sergeant Hawkins ; and it seems to me, we ought not to follow the British judges in changing it for reasons of humanity, which have no place here ; especially as their decisions are forbidden by the legislature to be followed as precedents, and when were it otherwise, we would be equally bound to follow them where they would bear hard on the prisoner, as they not unfrequently would.

The motion in arrest of judgment is founded on the absence of a direct averment, that the breaking and entering was with a felonious intent ; and although a larceny is charged to have been committed afterwards, it is argued with much theoretical plausibility, that this may have been in pursuance of a design subsequently hatched. It is certain, that all material facts must be positively charged instead of being collected by inference ; but in this particular the indictment is found to be in strict accordance with the most approved precedents, (Cro. Cir. Comp. 203,) and, for that reason, this motion, also, must be overruled.

The prisoner was sentenced to five years solitary confinement in the Eastern Penitentiary.

[PHILADELPHIA, JANUARY 9, 1832.]

Sherer *against* Hodgson.

IN ERROR.

In assize of nuisance, a plea in abatement, that, pending the writ, and since the last continuance, the defendant had abated and removed the nuisance complained of, is inadmissible, and may be treated by the plaintiff as a nullity.

WRIT of error to the Court of Common Pleas of *Chester* county.

James Hodgson, the defendant in error, was plaintiff below, in an assize of nuisance, instituted against Robert M. Sherer, the plaintiff in error, for raising "a certain dam of water in the townships of East Nottingham and New London in the said county, to the nuisance of the freehold of the said James Hodgson," &c. The defendant, *on the third of November, [*212] 1829, pleaded "not guilty, &c.," and by consent of parties, the assize was adjourned to the twenty-second of February, 1830, when the defendant pleaded in abatement "that pending the same writ and since the pleas last by him above pleaded, the nuisance complained of, if any existed, has been by him, the said defendant, abated, and that the said dam of water has been by him the said Robert M. Sherer, lowered, so that no

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nuisance is done to the freehold of him the said James Hodgson in the premises," &c.

An affidavit of the truth of the facts alleged in this plea, was annexed to it; and on the same day the defendant moved the court for a rule upon the plaintiff to reply instanter. The court denied the motion. The recognitors were then called, and sworn or affirmed, and the cause proceeded. On the following day, the recognitors returned a verdict, finding, in substance, that at the issuing of the original writ of assize, the defendant had raised the dam in question, to the nuisance of the freehold of the plaintiff, and that it be abated and removed, so as to remove and abate the swelling of the water upon the land of the plaintiff; and they assessed six cents damages, and six cents costs.

A motion made on behalf of the defendant in arrest of judgment, having been overruled, he sued out a writ of error, and assigned the following errors in the proceedings of the court below:

Plaintiff in error assigns the general error, and specifies—

First. The court erred in not requiring issue to be joined on the fact pleaded and verified by affidavit, that, pending the writ, the defendant had abated the alleged nuisance.

Second. The court erred in not requiring the matter of the plea in abatement to be first inquired of.

Third. The recognitors have not passed upon the matter of the plea in abatement; and there is nothing upon the record to contradict the fact pleaded, that, pending the writ, the alleged nuisance had been abated.

Fourth. The only fact found by the verdict is, that at the time of the issuing of the original writ of assize, a nuisance had been erected, and it was not the province of the recognitors to find a judgment.

Fifth. The judgment being entered generally on the verdict, would authorize a *distringas* to cause the nuisance to be abated, although this had already been done, pleaded in the action, and is not denied, either by replication or verdict.

The cause was argued in this court by *Dillingham* and *Chauncey* for the plaintiff in error, who cited Fitz. N. B. 426, note (a); 6 Rep. 551, (a); 16 Vin. 42, pl. 12; 3 Reeves's Hist. Eng. Law, 23, 28; *Barnet v. Ihrie*, 1 Rawle, 44; s. c. 17 Serg. & Rawle, 215, 218; *Booth on Real Actions*, 212, 213, 214, 260, 270; *Plowd.* 91.

Bell and *Tilghman* for the defendant in error, cited 1 Chitty Pl. 434, 443, 459, 480, 481; *Wise v. Wills*, 2 Rawle, 212, 213; 236

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3 Reeves's Hist. Eng. Law, 22, 23; 9 Rep. 55; Bro. Ab. A. Action *sur le case*, *29; 16 Vin. 42; Nuisance, 12; 2 H. 4, 11; 1 Barnes, 189; 1 Archb. 120; Hess v. Hee- [*213] ble, 6 Serg. & Rawle, 61, 62; 1 Roscoe on Real Actions, 73, 190, 204, 301, 302, 308

The opinion of the court was delivered by

GIBSON, C. J.—The rejected plea was, in substance and in form, a plea in abatement. It was founded on a supposititious note of Lord Hale to a passage in Fitzherbert, where it is said that if the defendant abate the nuisance pending the assize, the writ shall abate also. If that were so, the author of a nuisance might foil the injured party forever by removing the cause of offence pending the assize, and replacing it as soon as he had abated the writ and soused the plaintiff in costs. Were the word plaintiff put for defendant, we could comprehend how the having recourse to an inconsistent remedy might abate one already in progress; and I suspect the difficulty in this note arises from an original misprint, retained from mere inadvertence in the subsequent editions. But whatever may be its origin, the books referred to in support of the principle, certainly fail to establish it, or afford it colour of authority; and indeed it has been abandoned in the argument of the concluding counsel, who has admitted that the matter contained in the plea, is available no further than to bar the assize for all but damages and costs. But every plea *puis darrien continuance*, as this was, must be drawn with great certainty, for want of which, just such another was treated in *Wilson v. Hamilton*, (4 Serg. & Rawle, 238,) as a nullity, which the plaintiff was not bound to answer. Here what is admitted to be matter in bar, was pleaded in abatement; and on that ground alone the judgment below might be sustained. But waving objection to its form, it is decisive that the plea contained, in substance, no issuable matter. It will not be pretended that the plaintiff was bound to demur to or traverse the implied recognition of his own right; and what else did it contain? Simply an allegation that the nuisance had been removed since the impetration of the writ; and it remains to be shown how that could conduce to what is the object of every collateral plea in this sort of action—to prevent the assize from passing. Mr. Roscoe who has looked particularly into these matters, and collected the results in his treatise on actions relating to real property, says (page 301,) that there are four ways of taking an assize:—1. In the point of assize; which includes but the question of seisin and disseisin: 2. Out of the point of assize; which includes collateral matters pleaded in bar, by the traverse of which the seisin and disseisin are not admitted: 3. For dam-

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ages; where some matter pleaded collaterally has been found against the defendant: 4. At large; where the defendant attempts to put some particular matter in issue and fails in doing so, either by bad pleading or making default. It is not pretended that our case falls under the first or second of these heads; but it has been supposed to fall under the third, and with what reason remains to be seen. To me it seems to fall [*214] under the fourth. The assize is taken *for damages only where special matter pleaded collaterally has been found against the party pleading it; a corollary of which is, that it shall not be taken at all where it has been found for him; consequently a collateral plea like the present, must, to be available at all, furnish a complete bar to the whole action; and that the matter pleaded here, would, if found for the defendant, have debarred the assize entirely, is not pretended. On the contrary, it is admitted that it would still have to pass for the damages; and the reason why it shall pass for no more, is, that the seisin and disseisin have been admitted. But it follows not that the plaintiff is not to have judgment for that part of the cause of action which is confessed by the plea. The matter pleaded here was, however, altogether unavailing, as it would have put the defendant, if found for him, on no better ground than if it were found against him, for still the assize would have to pass. Granting that the finding of it in his favour would have given him whatever advantage he could have derived from the finding of an ordinary collateral plea against him (and the fallacy seems to consist in supposing that to give some sort of advantage,) to what does it amount? The reason for taking the assize only for damages, is not because the defendant has gained an advantage as to the other parts of the demand, but because those parts have been established by his admission of whatever he has not denied, the plaintiff being thus relieved from a part of his proof, but being still entitled to the same finding and judgment as if his whole case were made out in the ordinary way. Were it otherwise, the defendant might perpetuate the wrong by the bare acknowledgment of it. It must be evident, then, that where the assize is taken but for damages, the plaintiff is to have judgment not only for the damages and costs, but for those things that have been admitted as well as those which have been contested. If such, then, be the predicament of a defendant whose plea has been found against him, what advantage would the defendant gain by being placed in a similar one; or why should he insist on putting before the jury a matter, which, if true, could operate only against him by relieving the plaintiff from a part of his proof? It would surely be unreasonable to compel the plaintiff to put in issue a matter which he would be the last man in the

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world to contest. Why, then, should he not have judgment for his whole cause of action, by whatsoever means established? It would be nugatory, say the counsel, because the nuisance has already been abated. But if a general judgment were not interposed, I see nothing to prevent the defendant from erecting the nuisance afresh as soon as the question of actual removal were determined in his favour, which he could not hope successfully to do in the face of an impending *distringas*. It must be evident that if he could, by temporary removals, compel the plaintiff to go for but damages in successive writs, he might elude the specific character and consequences of the remedy by assize altogether, and reduce it to the substance of the modern remedy by successive actions on the case for the continuance. The unreasonableness of such an *advantage shows pretty clearly, the wisdom of the law [*215] in making the judgment, as well as the other parts of the proceeding, relate to the state of the nuisance at the impetration of the writ. But it seems no good reason can be shown why the defendant should gain an advantage by removing the nuisance before judgment, which he could not gain afterwards. and it will not be pretended that a removal of it between judgment and execution would be ground for an *audita querela* to vacate the award of a *distringas*. In the one case and in the other, the award of it would do him no prejudice; and the fallacy in either, is in supposing him entitled to have the judgment of the court on the existence and extent of the injury at the time of the trial. Such a supposition is irreconcilable to the established principles of the action, the judgment being to abate the nuisance described in the writ, or so much of it as is found to have existed, and execution being done by compelling the defendant to restore the ancient state of things in the presence, and by the direction of the recognitors, who are to determine by actual view, the extent of the encroachment on the plaintiff's right. That is an advantage peculiar to the action, but one that would be lost were the defendant to have the extent of the injury and the measure of its redress, ascertained at the trial. He suffered no injury, then, in being prevented from anticipating the time for the determination of those matters. If he has justly and truly removed the cause of offence, whether before judgment or afterwards, the consequences must be the same. The sheriff and recognitors coming to see execution done, and finding it done already, will proceed no further; and thus the defendant will receive neither molestation nor injury. It seems, therefore, that all the errors, depending as they do on the same principle, are disposed of by the preceding remarks; and as the

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defendant has received no injury, we are unable to say that any of them has been sustained.

Judgment affirmed.

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*[PHILADELPHIA, JANUARY 9, 1832.]

The Delaware Insurance Company *against* Archer and Others.

The plaintiffs loaned in Philadelphia to the defendants, seventeen thousand dollars on *respondentia*, by the ship *Juniata*. at and from Liverpool to Canton, and thence to Philadelphia. No *respondentia* bond was executed at the time, as the shipment was to be made at Liverpool, and it was uncertain whether it would be in specie or goods, but it was to be given subsequently, and in the meantime, an agreement was made by the parties, that bills of lading outward at Liverpool for seventeen thousand dollars, if specie should be shipped, or for twenty thousand dollars, value of goods at par, if specie should not be shipped; ("in which case the lenders should only be liable to average and entitled to salvage, as if it had been a specie shipment;") and also, bills of lading of the returns at Canton, should be assigned to the lenders, as collateral security for the bond to be given. The vessel sailed from Liverpool with seven hundred pieces of goods to the value of twenty thousand dollars, but without specie, and she was immediately afterwards stranded and lost; in consequence of which, forty-five of the seven hundred pieces were totally lost, and six hundred and fifty-five saved, but in a damaged condition. Held, that the plaintiffs were not liable for the damage of the goods saved, but only for the part totally lost; the meaning of the agreement being, that they should be exempt from damage, as they would have been, if specie had been shipped.

THIS action was brought in this court by the Delaware Insurance Company, against Samuel Archer and others, to recover a sum of money claimed to be due on a *respondentia* contract, upon the true construction of which the decision of the cause depended, the facts being undisputed.

On the 23d of September, 1825, the parties agreed in writing, that the plaintiffs should loan to the defendants seventeen thousand dollars on *respondentia*, for the voyage of the ship *Juniata*, Keck, master, at and from Liverpool to Canton, and thence to Philadelphia, at the premium of eleven per cent., and half per cent. per month additional, for any time the voyage might be longer than one year from the shipment, and date of the bills of lading at Liverpool, and until which time legal interest was to be paid on the receipt of the bills of lading, when they were to be assigned.

They also agreed, "that the bills of lading outward at Liverpool, for seventeen thousand dollars, in specie, if specie is shipped, or for twenty thousand dollars value of goods, at par, if specie is not shipped, (in which case the company shall only

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be liable to average, and entitled to salvage, as if it had been a specie shipment,) and the returns or investment thereof at Canton or elsewhere, amounting to seventeen thousand dollars, are to be assigned to the Delaware Insurance Company of Philadelphia, and that the supercargo or consignee will be directed to consign the said returns or investment to the Delaware Insurance Company of Philadelphia, and forward original and duplicate bills of lading and invoices, under sealed covers, addressed to the said company, as a collateral security for the payment of the bond to be given by the said Samuel Archer," &c.

A shipment of seventy bales of dry-goods, was made by the defendants *from Liverpool, in conformity with this [*217] agreement, by bill of lading dated November 16, 1825, the invoice amounting to four thousand four hundred and forty-six pounds eleven shillings, sterling.

On the 30th of November, 1825, the ship Juniata sailed from Liverpool on her voyage to Canton, with the said goods on board, and on the next day was utterly lost by the violence of a storm on the coast of Ireland. Six hundred and fifty-five pieces out of seven hundred pieces of which the said invoice was composed, were specifically saved from the wreck, but greatly damaged, and the net salvage which they produced at Liverpool, was seven hundred and forty-six pounds fifteen shillings, sterling.

If specie had been shipped, as the witnesses swore, it would have been stowed under the ballast, which was entirely lost at sea, when the ship struck on the first reef of rocks, and her bottom was beaten out; after which she beat along the rocks for two or three miles. The only specie on board was stowed under the ballast, and entirely lost.

It appeared, that it was part of the condition of the *responsientia* bonds in use in the Delaware Insurance office, that the borrower is to account for "a just or proportionate average or salvage of the goods shipped, and which shall not be unavoidably lost by fire, enemies, men of war, or any other casualties."

A verdict was taken by consent for eighteen thousand eight hundred and sixty-five dollars and nine cents, subject to the opinion of the court upon the whole evidence. If the court should be of opinion that the plaintiffs were entitled to recover without being liable for damage sustained by the defendants' goods, judgment was to be entered for the plaintiffs for the above sum. If the court should be of opinion that the plaintiffs were entitled to recover on the principle of liability for said damage, judgment was to be entered for the plaintiffs for four thousand four hundred and thirty dollars and fifteen cents; and if the court should be of opinion that the plaintiffs were not entitled to recover, then judgment was to be entered for the defendants; any

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errors in calculation to be corrected by the parties. The court was to have power to award a new trial, or appoint referees to settle the calculations, if they should think fit.

The plaintiffs claimed the salvage of the goods, as if saved free from damage, but allowing for the total loss of the part lost; that is, six hundred and fifty-five seven hundredths of seventeen thousand dollars, less the expenses of general average, which was two and one hundred and sixty-four one thousandths per cent. on the cargo, with the difference of exchange, and interest from the 29th of June, 1826.

The defendants alleged, that the plaintiffs were entitled to recover no salvage, or if any, only the actual salvage of the goods, according to their depreciated value, after they were recovered from the ship, damaged by the perils of the sea.

Binney for the plaintiffs.—This case depends on the construction of a memorandum of an agreement, intended to be reduced [*218] to a regular *respondentia* bond, which was to have been given when the bill of lading of the shipment at Liverpool, should be received by the borrowers in Philadelphia, but which was prevented by loss. In the event of goods and not specie being shipped, the company were “only to be liable for average, and entitled to salvage, as if it had been a specie shipment.” These are the words to be interpreted. It is to be inferred, that a specie shipment was contemplated, in which case, the loan was to be on its precise amount; but if goods were shipped, the amount of the security was to be increased to twenty thousand dollars. The memorandum contemplated the usual course of *respondentia* loans on shipments from Philadelphia to Canton and back, which is on specie out, and on goods home. The memorandum as to the specie risk is applicable only to the outward voyage. The returns at Canton, amounting to seventeen thousand dollars, were to be the security home, and the memorandum is not applicable to them. The intention was to put upon the company a specie risk out, and a merchandise risk home.

The memorandum is capable of three interpretations only. 1. That the whole effect and intention of it was to protect the company from damage on the outward voyage. 2. That it was intended to substitute an imaginary for a real adventure, and to make the company liable accordingly as it might be conjectured, that the imaginary adventure would have fared in the events that have happened. 3. That it was intended to consider the goods identically as specie, and to treat all the loss that happened to the goods, as having happened to specie. The first is the interpretation of the plaintiffs. The second deprives the

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plaintiffs of all salvage; it being conjectured, that if specie had been shipped, it would have been all lost. The third construction makes the plaintiffs liable for damage as in the case of goods, and entitles them to the salvage.

The first is the true construction. The sole intention of the agreement was to secure the company from damage, which is not incident to a specie shipment. There are two kinds of loss; total and partial, and two kinds of partial loss; total loss of a part, and damage or injury, either to part, or the whole. The terms, average loss, used in the memorandum, are applicable only to a partial, and not to a total loss. The intention of this clause in *respondentia* bonds, is to make the lenders liable for partial loss, which they would not otherwise be. Phill. on Ins. 369, note (a.) 375; Park. on Ins. 132; 2 Marsh. on Ins. 760. To what kind of particular average then is merchandise liable, to which specie is not? It is impossible to suggest an injury, to which one is liable, and not the other, except damage. The phrase then, "liable to average as if it were a specie shipment," means liable to such average as specie is liable to, and not to average arising from damage, to which specie is not liable. This construction of the memorandum assimilates the contract to a *respondentia* loan on specie out, and goods home, which was the common contract of the company. They are liable to a total loss of part, as well as of the *whole, but not to damage, [*219] which in the ordinary shipment they can never incur on the outward voyage. From this it was the intention of the memorandum to protect the company, if goods should be shipped, instead of specie. The premium or marine interest was governed by it. By giving the borrower the option of shipping goods instead of specie, the company did not mean to subject themselves to one species of particular average, viz., damage, which is not incident to a specie shipment. The plaintiffs' construction is to be preferred to any other, also, because it renders the contract certain and free from all difficulty, either as to the rule or the application of the rule. This case shows the truth of the remark. The goods were in part lost, and in part damaged. Of the seven hundred pieces shipped, six hundred and fifty-five were saved, but in a damaged state. If the company are free from damage, then forty-five seven-hundredth parts are lost, and for this average they are liable, while six hundred and fifty-five hundred parts are more or less damaged, for which they are not answerable. The general average or expense of saving being applicable to specie as well as to goods, they are answerable for that also. Many other cases of a similar kind may be imagined. The construction now contended for is further recommended, by being just between the parties. No premium being

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paid, except on a specie shipment, there would be injustice in permitting the defendants to throw upon the company a loss by damage, when they have received no consideration for such a risk.

To support the interpretation, that it was intended to substitute an imaginary for a real adventure, the argument is, that the company agreed to pay any loss, that would have happened to specie, if specie had been on board, and as it would have been lost altogether, had it been shipped, the company are bound to stand by a total loss, and are entitled to nothing, while the borrowers are to keep all that was saved. To this interpretation there are many objections. In the first place, it converts the contract into a pure wager. The supposed fate of an adventure, which never existed, is to decide the fate of the contract. That supposed fate is to be ascertained, not by evidence, but by conjecture, or presumptions, derived from what has happened to another adventure. According to this interpretation, whatever would have hurt specie, shall be deemed to have hurt the goods, and what would not have hurt specie, shall be deemed not to have hurt the goods, and by this criterion the liability of the company is to be determined. The consequences of such rule, both to the borrower and the lender, would be highly injurious and unjust. Specie cannot be burnt. Suppose the goods are all destroyed by fire, then, because, if instead of goods, specie had been on board, it would not have been burned, the goods are to be considered as not burned. The company lose nothing, and the borrowers are bound to pay. On the other hand, goods are not likely to be taken by pirates at sea, and specie is. A pirate takes all the specie on board, and leaves the goods. In this [*220] event, the goods are to be considered *as piratically taken, and the borrowers are discharged, though they have all their goods in safety. A *jettison* takes place, and bulky goods are thrown overboard, but no specie; but according to this construction, if the value of the goods had been in specie, it would have been safe, and consequently the lenders are not answerable. Thus there is a complete substitution of fiction for fact.

If evidence be applied to anything but the very case to be proved, it does not deserve the name of evidence. It is guessing what would have happened to one thing, from what has happened to a different thing.

The witnesses swear, that if specie had been shipped, it would have been stored in the run, and if it had been placed in the run of the *Juniata*, it would have been lost, because the specie that was on board was placed there, and was lost. Here, then, are two ifs, which take away the character of evidence, the

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object of which is to establish facts that have occurred, and not what never did occur. Such proof establishes no fact, but a probability, that something different from what did happen would have happened, if another state of things had existed. A probability is not a fact, but the chance of a fact. If the specie had been on board, it might not have been placed in the run, and then the whole theory fails. If it had been there, and the seventy bales of goods had not been on board, the ship might have been saved. She might have obeyed her helm better; she might have been lighter, and gone over the rock; it might have affected her sailing, and carried her on at a different time of tide, earlier or later. It is impossible to say to what conjecture may lead, and it is impossible gravely to suppose that the parties entered into such a contract, to be decided by such evidence. The construction now under consideration takes from the contract the character of indemnity altogether, making the company lose their money, when the thing pledged is wholly safe, and the borrower pay, when it is wholly lost. It misconceives the terms, as well as the design of the memorandum. It leaves total losses exactly as they would stand without it. The total loss of the goods by fire discharges the loan, because it is to be borne by the lender as a *respondentia* on goods. So of a *jettison*, and the like. This conclusively proves, that it was not intended to make the possible fate of an imaginary adventure the guide in determining the responsibility of the company. It is certain, that they were to be liable for all losses, except average losses, according to the fate of the very goods.

The third interpretation which has been suggested, which considers the goods as identically specie, and treats all the loss which happened to the goods as having happened to specie, is obnoxious to objections no less strong. It makes the whole memorandum useless. If the injury to the goods was to be the rule, it was unnecessary to say anything about a specie shipment. If there had been no reference to specie, the company must have borne loss by damage as well as all other losses. By this reference to specie, the intention must *have been [*221] to qualify the claim on goods, but the interpretation now under consideration, supposes that the claim on goods is not affected by the reference to specie. This interpretation is a mere fancy. To suppose that goods are specie, and that as specie they are damaged, is not only a double fiction, but an absurdity. It would be better to say, that the reference to specie has no meaning whatever, and must therefore be struck out of the contract. This however cannot be done, if the court can extract a meaning. Both parties certainly had a meaning, which was to exempt the company from an average loss; or

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damage, to which specie is not subject, and goods are. This construction places on the borrower one particular risk of goods, that of damage, because he has paid no premium for it, and has for his own interest shipped goods instead of specie, according to the practice.

Price and Chauncey, for the defendants.

1. By the clause which gives a peculiar character to this agreement for a *respondentia* loan, "the company shall only be liable to average and entitled to salvage, as if it had been a specie shipment." Goods were shipped and lost under circumstances which would have produced no salvage. By the terms of the agreement, therefore, it is clear that the plaintiffs cannot recover any salvage. It is not allowable to interpret that which is clear and needs no interpretation. But if there is to be an interpretation of an ambiguous contract, it must be most strongly against the party who uses the language to be interpreted. The clause in question was introduced by the company to save themselves from the losses peculiar to goods, such as sea damage, &c.; but while they cast upon the defendants losses of this description, by making themselves liable to average only as if it were a specie shipment, on the other hand, they conceded to the borrowers the advantages of safety peculiar to goods, by being entitled to salvage, only as if it were a specie shipment. They must consider it throughout as a specie shipment. They cannot consider the shipment as goods for the sake of saving them from the sea, and then as specie, to escape liability for sea damage to goods. Here is the fallacy of the opposite argument. If specie had been shipped, there would have been no salvage at all. Yet on the actual salvage of goods, produced only because the shipment was of goods and not of specie, it asserts a claim, as if the goods specifically saved were saved clear of damages, because specie would not have sustained sea damage. This is building a superstructure without a foundation, as there would have been no salvage of specie. It is an effort to engraft a living branch on a dead trunk. That the actual safety to specie, would afford the standard of adjustment of a partial loss, is proved by considering the case of a shipment partly of specie and partly of goods, and a partial loss of specie to a greater or less extent than of goods, in which case, the whole loss would be adjusted according to the loss of specie; and the entire loss of specie, cannot [*222] vary the principle. They cannot consider the shipment as goods to keep them from sinking, and as specie to escape sea damages, but must treat it as one or the other, throughout. What would have been the fate of specie, if it had been on board, the testimony leaves no doubt. Be that as it may, it is for the

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plaintiffs to prove, that there would have been salvage of specie to entitle themselves to recover on this contract, and of this they have not given a particle of evidence. The terms of the contract imposes this obligation upon them, and to the strict terms of their contract they are held by the authorities in analogous cases. In *Cook v. Jennings*, 7 T. R. 381, there was an express covenant to pay freight on delivery at Liverpool. The ship was wrecked at B. and the goods accepted there by the consignee. Held, that a delivery at Liverpool was a condition precedent to a recovery. In *Burnett v. Kensington*, 7 T. R. 210, there was an insurance on fruit, warranted free from average, unless the ship was stranded. She was stranded, and though no damage was the consequence of the stranding, the insurers were held liable for an average loss arising from the perils of the seas; that being the grammatical construction of the instrument. The insurer on freight agrees to return part of the premium "if the ship sailed with convoy and arrives." The ship having sailed with convoy and arrived, the insured recovered the return premium, though the ship, having been captured and recaptured, the insurer was obliged to pay for salvage. *Aguilar v. Rodgers*, 7 T. R. 421. So if the ship sail with convoy and arrive, this will entitle the insured to the stipulated return of premium, though the goods insured be afterwards lost, and the underwriters obliged to pay a total loss. *Horncastle v. Haworth*, 2 Marsh. on Ins. 674. The case of *Parker v. Towers*, 2 Browne's Rep. Appx. 80, is in principle the same as this case. It was an insurance on commissions valued at seven thousand dollars, "free of average and without benefit of salvage." The vessel was captured, and during the capture the insurer abandoned and recovered for a total loss, although the vessel being afterwards released, he earned his commissions, and thus had both his commissions and the amount insured. In the present case, the actual salvage of goods in their hands, is the defendants', by the fair and just reciprocity of the contract. If goods had been lost, when specie would have been safe, the loss would have been theirs, and the chances were much against them from the risks of sea damage, fire, &c. Having stood their own insurers for the risks peculiar to goods, they are entitled to the salvage of goods, when specie would have produced none.

2. But this contract is void, and neither party can have a remedy upon it. It is contrary to the nature of the *respondentia* contract, to leave the borrowers subject to the risks of the articles hypothecated. It is a loan "upon condition that if the thing upon which the loan has been made, should be lost by any peril of the sea, the lender shall not be repaid." *Emerigon*, 24, 33. To allow the risk to be modified by the lender, is opening the door

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[*223] to abuse, and *the practice of usury. "The insurer may restrict himself to particular sea risks; but against lenders such a limitation would be void." Ibid. 40. "It would be intolerable, if the borrower, after having lost his property by an accident within the time and place agreed upon, should be obliged to pay the whole principal, with maritime interests, under pretence of an agreement, which was radically void and usurious." Ibid. 165. (Hall's translation.)

The contract is void, because it is a wagering contract. It is wagering, because the indemnity from loss is not commensurate with the risks incurred. The risks assumed are those of specie. The articles at risk are goods, liable to very different perils from those which specie encounters. According to their diversity, one or the other party would be the gainer or loser, contrary to the principle of indemnity. The claim of the plaintiffs, of more than four times the actual salvage, and of the defendants to keep the actual salvage, shows this to be a wagering contract. An insurance cannot be made upon one thing, to depend upon the fate of another. It is a wager. Thus, money expended in reclaiming a cargo, cannot be insured upon the event of the ship's safe arrival, though in the ship, and its fate so nearly connected with that of the ship. *Kulen Kemp v. Vigne*, 1 T. R. 304. The cases of *Kent v. Bird*, Cowp. 583, and *Lowry v. Bourdieu*, 2 Doug. 468, are similar in principle.

The provisions of the stat. 19 G. 2, against wagering policies, have been adopted in Pennsylvania. 3 Yeates, 461; 4 Yeates, 168; 1 Rawle, 196. By the 5th section of that statute, *respondentia* loans shall only be on the merchandise or effects on board. Such a contract being wagering and illegal, neither party can have any standing in court, to enforce it. 4 Yeates, 24; 1 Binn. 119; Doug. 451; 1 East, 96; 3 Bos. & Pull. 35; 3 T. R. 266; Cowp. 790. The illegal ingredient, affects the whole contract; 11 East, 502; 8 T. R. 46, 562; 2 Binn. 324; Pothier, 39; 1 T. R. 225.

3. If the contract is to have any interpretation, different from its strict and grammatical import, the only one that is equitable is this; that the borrowers were to be liable for damage peculiar to goods, in the ordinary course of the voyage, but if any extraordinary accident should occur, such as shipwreck, (as was the case here,) to occasion a loss common both to goods and specie, the whole damage should be referred to that cause, and the actual salvage, should be the standard of adjustment. Thus, in this case, the whole loss should be referred to the shipwreck. If goods are saved, and got on shore, and are there plundered by the inhabitants, it is still a loss by the perils of the sea. 3 Eng. Com. Law Rep. 57. The whole is to be attributed to the

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first cause, without which, none of the loss would have happened. Phill. 286, 288; 11 Johns. R. 90.

Reply. It is argued on behalf of the defendants, that the language, upon the construction of which the case turns, is the language of the plaintiffs, and therefore to be taken most strongly against them. *This admits that it was intended to [*224] benefit the company, by diminishing the risks they otherwise would have run, which is a material circumstance. But, in truth, it was the language of both parties, and is to be fairly construed. When the meaning of language is ascertained, it is to be applied, without regard to consequences; but it is an argument against a particular interpretation, that it leads to absurd consequences. The interpretation alleged by the defendants, does lead to absurd consequences, and moreover, is a violation of what has been termed the grammatical construction of the memorandum. To say, as the defendants do, that the company are to have salvage, if specie would have produced it under the circumstances which happened, without regard to the actual fate of the goods, is absurd, and would operate in some cases to their own disadvantage. If the goods are all lost by fire, and specie could have been saved, they would have to pay salvage altogether, though a total loss happened. The terms of the contract are not "if specie would have produced salvage under like circumstances." This is the language of the whole argument, but it is not to be found in the memorandum. The language of that instrument is, "to be liable to average, and entitled to salvage, as if it had been a specie shipment," which, if carried out into the terms used in the bond intended to have been executed, would read thus; "liable to average, and entitled to the benefit of salvage, in the same manner, to all intents and purposes, as underwriters on a policy of insurance, on specie out and goods home, according to the usages and customs of the city of Philadelphia." There is nothing in the instrument referring to an uncertainty, as the rule of decision upon the rights of the parties. The whole argument, therefore, begs the question.

It is further argued, that the company is to have no salvage, if specie would not have produced it, as an equivalent advantage for agreeing not to claim for damage on goods. This admits the construction of the plaintiffs to the extent, that the meaning of the words liable to average, as on a specie shipment, is, being not liable to partial damage, because specie is not so liable.

How then can the correctness of the rest of the plaintiff's construction be denied? It follows as a consequence, that the words, entitled to salvage, as on a specie shipment, mean salvage,

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undiminished by damage; salvage in proportion to the original value saved; salvage, as it is in cases of specie, according to the quantity saved, without taking damage into consideration. The clause was not intended as a corresponding benefit to the borrowers, as is supposed, but to carry through the exoneration of the company from the risk of deterioration by damage, and the corresponding benefit to the defendants, was, in paying a premium only on a specie risk.

The defendants, it is said, are to keep the salvage, because if they had insured against partial damage, a risk which the company would not take, their underwriters would have been entitled to salvage. *This is an error. No underwriter [225] against damage, is entitled to salvage. It belongs to him, who pays a total loss.

The argument of the defendants stands no better upon authority, than upon reason. To the various authorities, which have been read to sustain a strict construction, it may be answered, that when the meaning is fixed, the contract may be applied to the facts with the utmost strictness, but authorities, which decide, that the true way to get at the real meaning of a contract, is to construe its language strictly, are entitled to little respect, nor do any of those cited for the defendants, proceed on this as a rule to construe commercial instruments. (Mr. Binney here referred to, and commented on the cases cited by the defendants' counsel.) These cases prove nothing to the purpose of the defendants, which is, that the contract should be so construed without regard to the consequences, as to produce absurdity. No case can be found, which supports such a principle.

Finally, the contract is assailed as a wagering or gambling contract. If it be so, it is certainly void, and no recovery can be had upon it. But no contract was ever held to be a wager, where there was a real interest, and a reasonable meaning could be given to it, which would make the contract valid. If the contract means what the plaintiffs say it does, it is a perfectly just, mutual, and reasonable contract.

It is assailed also, because, as it is said, to settle losses on this principle would be contrary to the nature of *respondentia* loans. The real contract is, that the lender shall assume all risks except deterioration or damage of the goods, on the outward voyage, and surely this is lawful. Emerigon means to say, that to prevent the loan from being usurious, the marine risk must be run, but this does not mean, that the lender is to take the risk of damage. A *respondentia* loan, free from average, would not be bad. This was formerly the universal contract. It is true, the marine risk must be run, but the lender may re-

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ject the risk of damage to goods, and the borrower may agree, that he shall have his salvage, without regard to damage. The premium, in this case, is not for all risks. Indemnity is according to the contract, and a policy is an indemnity, though it rejects all risks, but one. All the views, that have been presented to destroy the plaintiffs' right to salvage as on a specie shipment, are fallacious, unjust, and fanciful.

Then as to those objections, which confine the plaintiffs to the salvage of damaged goods. To say, that if the damage arises from ordinary means, it is one thing, and if from extraordinary, it is another, is to make, and not to expound, the contract of the parties. In every case, for none is excepted, average is to be settled as on a specie shipment, and salvage to be estimated, and paid in the same way; on specie, the partial loss is the specific part lost; the salvage is the specific part saved.

It is a mistake to suppose, that the defendants are merely to account for what is actually saved, without regard to its condition. The salvage is the property of the borrower, which he agrees to *account for as sound, in like manner as if it were specie. This is the agreement, and there is no [*226] conjecture about it, for the goods considered as sound, constitute a salvage of six hundred and fifty-five seven-hundredth parts of the shipment.

The opinion of the court was delivered by

GIBSON, C. J.—A considerable part of the argument on the part of the defendants, has been to prove that the perils to which specie is exposed, are as numerous and as imminent as those which are incident to goods. It is sufficient, that the parties themselves thought otherwise, and provided for the supposed difference accordingly. That they intended to do so, can scarcely be doubted; else the clause by which, if goods were shipped instead of specie, the lender was "to be liable to average and entitled to salvage as if it were a specie risk," would have been nugatory. They undoubtedly meant something by it; and I am unable to see how the lender is to be precluded by any supposed principle of equitable compromise without regard to the terms of the contract, from recovering more than the value of the property saved; for that would be the legal effect of leaving the clause entirely out of the contract. It seems to be held both by the English and the American courts, that the lender takes the risk only of a total loss; but that any part of the property which arrives, goes to the lender, without regard to whether it be great or whether it be small, so that it does not exceed in value the amount of the loan, has

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never, I believe, been doubted anywhere. Nor can I see, that if the parties had intended to provide specifically for cases like the present, the lender would have stipulated in terms, against liability for losses from what has, in the argument, been called sea damage. Every profession or business necessarily has its technical language, because having the signification of its terms fixed beforehand by usage and common consent, they not only express the meaning of those who use them with more precision, but are more comprehensive and less liable to misconstruction than popular terms, that have not the same advantage in respect of certainty. It seems, as I have already said, that the lender is not liable to average by the principles of the English law; and it is therefore usual to dispose of the subject by a special clause in the contract. But a stipulation that he should take on himself the ordinary risks in a policy of insurance, that of deterioration by the contact of sea-water excepted, would have been too narrow to answer the whole intent of the parties, which was evidently to make provision, not for a species, but a class. There doubtless may be deterioration from other causes, though I am not familiar enough with the subject to point them out; at least the parties may have apprehended, that some such might exist, and it was probably for that reason, they thought proper to fix a particular standard, by which the nature and extent of the risk could, under any combination of circumstances, be certainly determined. The terms employed to exclude the excepted perils, are, in my [*227] apprehension, *perfectly definite and perfectly intelligible, and show that the parties knew perfectly well what they were about. The words, "average" and "salvage," of course relate to a partial loss; and the words, "specie risk," sufficiently indicate that only such was intended as is common to both specie and goods. The language of the cause is pointedly applicable to a loss from a peril common to both, and if the actual meaning of the parties were not conformable to it, it is impossible to conjecture what was meant. As respects the goods saved, then, we have the case of a partial loss, not by destruction of a part, but deterioration of the whole, occasioned by a peril, from which such an injury to specie could not have happened; and if the clause is not to operate in such a case, it is impossible to imagine one, in which it may; certainly none has been suggested. What remains then is to say, whether the question of total loss made by the defendants, is to be determined by the actual fate of the goods, produced as it was by a peril common to both, or by the conjectural fate of a shipment of specie in the same circumstances.

The object of the clause was to permit the borrowers to sub-

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stitute goods for the money; and being for their convenience, it was of course not to produce an enhancement of the risk. The lender was paid for a specie risk, and consented to stand to no other; consequently, the borrowers took on themselves all beyond what was necessarily incident to the specie shipment. But notwithstanding all but an inconsiderable number of the packages were saved, though in bad condition, the borrowers insist that, if specie had been in its place, the evidence would raise a violent presumption of its destruction, and hence they claim to charge the lender with a total loss, even without the benefit of salvage in proportion to the value of the goods saved. That is evidently an unsound construction of the contract, as it would put the lender in a worse state than if the privilege of shipping goods had been granted without any restriction of the risk whatever. If nothing more had been said, there would have been an indisputable right to salvage. But from the very nature of the agreement, the conjectural fate of the imaginary shipment of specie, was, as respects perils to which it would have been subject as such, to follow the actual fate of the merchandise shipped as its substitute and representative. And this was, in another aspect, extremely advantageous to the borrowers, who might have shipped even gunpowder, which, as regards a total loss from explosion by the accidental firing of the ship or a shot from an enemy, would have been at the risk of the lender. Yet it would be otherwise, if the rights and liabilities of the parties were determinable, not by the actual fate of the gunpowder, but the probable fate of specie in the same circumstances: and thus the effect of the clause would be to deprive the borrowers of indemnity for a total loss contrary to the legal effect of the contract, and manifest intent of the parties. The plain meaning of the agreement is, that goods shipped in place of the specie should be specie for every purpose, but to increase the risk *of partial loss. It is difficult to believe, that the parties intended to commit the question of ultimate liability [*228] to the boundless ocean of surmise, when the fate of the actual shipment would furnish a certain criterion, and one equally fair as to both. The contract of insurance, or *respondentia*, is a contract of indemnity for real, not imaginary, losses. In *Save v. The Middletown Insurance Company*, 1 *Connect. Rep.* 243, Mr. Justice Baldwin, in delivering the opinion of the court on a claim for straining while the ship was stranded, remarked, that "invisible, uncertain, and conjectural damages are never the subject of remuneration;" and certainly the remark is applicable with at least equal force to a conjectural loss. It would evidently be unfair to conduct the adventure in the shape of goods with their peculiar properties, to the point of immediate danger, and

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there substitute imaginary casks of dollars to determine from the probable event, the question of total loss. If conjecture is to operate at all, it must begin its office at the point of embarkation ; and it cannot be affirmed with certainty, though the custom of such voyages may render it probable, that specie would have been stowed in the run of the ship, or in any other part that would have exposed it to greater danger of total loss, than that to which the goods were exposed. But taking the fact to be otherwise, the most experienced navigator could not have predicted the event, had the ship sailed in ballast. Beginning the voyage at another period, with trim and sailing materially different, and with perhaps more favourable winds and weather, the chances are infinite, that she would not only have escaped the particular disaster, by which the loss was occasioned, but have weathered the coast altogether. It is not less reasonable to presume, that such would have been the event, than that casks of dollars would have been lost through a rift in her bottom. The presumption, on the contrary, is, that she would not have been driven to the place where the rift was made. The adventure is to be taken as goods or specie throughout ; but certainly not as goods to bring it into jeopardy, and specie to increase the danger in order to fix the lender with a supposititious loss. Considering the goods then as representing the specie loaned, it is impossible to say, the lender had not an insurable interest. I am unprepared to say, what would have been the effect of the contract, had the goods been uncovered, or had the risk not attached. But taking for granted, that the want of an insurable interest would, in analogy to an illegal insurance, the premium for which cannot be recovered back, have rendered the contract void, yet if an agreement to insure money, or goods the produce of it, at the option of the borrower, does not give an insurable interest in the thing selected and put on board, then parties are incompetent to contract for the insurance of a thing to be designated by the insured. I am apprised of no rule of law or policy which forbids it. The goods then being specie for the purpose of determining the average, are specie also for the purpose of [*229] determining the salvage. The packages saved are to be treated as casks of dollars, in regard to which there has been no loss whatever ; and the plaintiff being entitled to recover in proportion to the number, is to have judgment for the largest sum found in the verdict.

Judgment accordingly.

Cited by Counsel, 31 S. 155, s. c. 3 W. N. C. 201.

[PHILADELPHIA, JANUARY 9, 1832.]

Case of Samuel Walker's Estate.

APPEAL.

Testator devised to his wife certain real estate, and "also, all his household goods and furniture, moneys, bonds, mortgages outstanding debts due and owing to him, and all other his personal estate of what nature or kind soever." He devised to trustees, for the use of his son, certain other real estate, and to the same trustees, for the separate use of his daughter, certain other real estate, declaring in his will that the husband of his daughter should not, in any event, nor by reason of any cause, ways, or means whatsoever, have any right, claim, or interest in his estate, in right of his wife or otherwise, nor receive any benefit or advantage therefrom. These devises and bequests disposed of the whole of the estate the testator then possessed. After the execution of his will, he acquired other real estate, and died indebted to various persons, without having republished his will, or made any codicil disposing of the real estate made after its execution. Held, that the bequest of the testator's personal estate to his wife, was not specific, and that there was nothing in the will which showed an intention to exempt it from the payment of his debts, and that consequently, it was to be applied to that purpose before the real estate acquired after the execution of the will, could be resorted to.

ON an appeal by the executors of Samuel Walker, deceased, from the decree of the Orphans' Court for the city and county of Philadelphia, it appeared that the said executors, Elizabeth Y. Walker, Joshua Canby, and Thomas Betts, on the 17th of February, 1826, presented a petition to the Orphans' Court, setting forth that they had made a final settlement of their administration account, which had been confirmed by the court, and exhibited a balance of three thousand and thirty-one dollars and forty-five cents, due from the estate, for the payment of which there were not sufficient assets, and praying the court to grant an order for the sale of the real estate of the decedent, for the payment of his debts. The court thereupon appointed an auditor "to examine and report upon the necessity and propriety of the sale prayed for, as well with regard to the particular estates required to be sold, as the state of the personal estate of the deceased."

From the report of the auditor, which was made on the 2d of May, 1826, it appeared, that Samuel Walker, on the 1st of March, *1820, made his will, by which he devised and bequeathed to his wife, Elizabeth Y. Walker, a certain [*230] portion of his real estate, and also "all his household goods and furniture, moneys, bonds, mortgages, outstanding debts due and owing to him, and all his other personal estate, of what nature or kind soever, to hold to her, his said wife, Elizabeth Y. Walker, her heirs and assigns forever."

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He also devised to Thomas Betts and Joshua Canby, and the survivor of them, in fee, another portion of his real estate, of considerable magnitude, in trust, for the use of his son Samuel Jones Walker, the rents and profits thereof to be received by the trustees, and paid into the hands of his wife Elizabeth Y. Walker, as the guardian of his said son, to whose education, maintenance, and support, they were to be applied during his minority. After his said son had attained the age of twenty-one years, the said estate was to be held by the trustees, in trust for the use of the said Samuel Jones Walker, and for such other use and uses as he, by any deed, or by his last will and testament, or any writing under his hand and seal, executed in the presence of two or more credible witnesses, should limit and appoint, and for want of such limitation or appointment, then, after the decease of the said Samuel Jones Walker, in trust for the use of his child or children, who should be then living, and the issue of such as might be dead, in fee, as tenants in common; and for want of such child or children, or their issue, then, in trust, after the decease of the said Samuel Jones Walker, for the sole and separate use and benefit of the testator's daughter Ann D. Harper, during her life, so as not to be subject to the control of her husband, or liable for his debts; and after her decease, for the use of such child or children, and in such shares and proportions, as she by any writing in the nature of a will or appointment, executed under her hand and seal, in the presence of two or more credible witnesses should direct and appoint, and for want of such direction and appointment, in trust for the use of all and every, the child or children of his said daughter, who should be then living, and the issue of such as might be dead, as tenants in common, in fee, and for want of such child or children, or their issue, then, after the decease of his daughter, in trust for the use of the right heirs of the testator forever.

To the same trustees the testator devised another portion of his real estate, in trust, for the sole and separate use of his said daughter Ann D. Harper, upon the same trusts as those conditionally declared in her favour in reference to the estate devised to his son, and in the event of the death of his daughter, without leaving a child or children, or their issue, he gave the estate devised to his daughter, to his said son Samuel Jones Walker, in fee, and in case of the death of his said son without leaving a child or children, or their issue, to his own right heirs forever.

The residue of his estate, the testator gave to his said son Samuel Jones Walker, in fee.

In the last clause of his will, he declared, that he wished it to

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be *understood as his will and intention, that the husband of his said daughter should not in “any event nor [*231] by reason of any cause, ways, or means whatsoever, have any right, claim, or interest in his estate, in right of his wife or otherwise, nor receive any benefit or advantage therefrom.”

After the execution of his will, Samuel Walker acquired other real estate, and died on the 1st December, 1824, without having republished his said will, or adding any codicil disposing of the real estate acquired subsequently to its execution. He died indebted to various persons.

On the 7th December, 1824, an appraisement was made of the household furniture and movables of the testator, which with money on hand and in bank, at his decease, amounted to two thousand one hundred and forty-three dollars and seventy-six cents. Between the 10th December, 1824, and the 17th October, 1825, several sums amounting together to seven hundred and seven dollars and seventy-three cents, were received by the executrix, Elizabeth Y. Walker, making the whole amount of the personal estate received by her, of which an account was given, two thousand eight hundred and fifty-one dollars and forty-nine cents; but no account was given by her of the amount received in bonds, mortgages, and outstanding debts due to the testator; on the contrary, she set up a claim in her administration account to retain the whole personal estate of the testator, founding such claim upon the bequest of the same to her in his will.

On the 11th November, 1825, Thomas Betts and Joshua Canby settled an administration account in the register's office, stating that no assets of the deceased had come into their hands, and claiming the sum of one hundred and fifty-nine dollars and fifty cents for their services and disbursements, and on the 18th November, 1825, Elizabeth Y. Walker, settled her separate administration account in the register's office, claiming a balance of one thousand one hundred and forty-one dollars and sixty cents in her favour, and referring to a supplemental account, to be filed by her.

The auditor deemed it unnecessary to inquire into the propriety and legality of the several payments, for which credit was claimed by the said Elizabeth Y. Walker, in her administration account, as a proper decision of the matters submitted to him, depended on the question, whether, under all the facts of the case, the personal estate of the testator, as between the parties interested, was to be applied to the payment of his debts, before the lands acquired by him after the date of his will, were resorted to, it being his opinion, that the estates devised, were exempt, inasmuch as every devise of lands, is necessarily a specific

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devise. Elizabeth Y. Walker claimed all the personal estate of the testator, insisting that it was exempted from the payment of his debts, because it was specifically bequeathed to her, and that the debts due by the testator were to be paid out of the real estate acquired by him, subsequently to the execution of his will, and which descended to his heirs at law. But the auditor [*232] was of *opinion, that the bequest to her was not a specific legacy, but a general bequest, and there being no express direction or plain implication in the will, exempting the personal estate from the payment of the testator's debts, as between his legatees, devisees, and heirs at law, the personal estate was the proper fund for that purpose, and ought to be first applied to it. He therefore reported, "that there was no necessity for or propriety in directing a sale of the real estate, prayed by the said executors of the said Samuel Walker, or any part thereof."

The following exceptions to the report of the auditor were filed in the Orphans' Court, viz. :—

First. The auditor erred in the opinion, that the real estate of the testator, acquired subsequently to the date of the will, (and for the sale of which the above application was made,) is exempt from responsibility for the testator's debts until the personal estate shall have been first applied for that purpose.

Second. The auditor erred in the opinion, that the bequest to Elizabeth Y. Walker, wife of the testator, of the whole of the testator's personal estate, as set forth particularly in the will, is not a specific legacy but a general bequest, and that the personal estate is nevertheless liable and the proper fund to be applied for the purpose of paying the debts due from the testator.

Third. The auditor erred in the opinion, that there was no plain implication, by the said testator in his will, exempting his personal estate from the payment of debts, such intention being plainly manifested by a liberal construction of the will in question.

Fourth. The auditor erred in matters of law and fact in his said report.

After argument, the Orphans' Court confirmed the report of the auditor, and dismissed the petition for the sale of the real estate: whereupon an appeal was entered by Elizabeth Y. Walker to the Supreme Court.

D. P. Brown and Rawle for the appellant.—The case resolves itself into an inquiry whether the personal estate of the testator bequeathed to his widow, or the real estate which he acquired after the execution of his will, is to bear the burthen of his debts.

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The clause in the will which disposes of the personalty, imports a primary object, namely, a competent provision for the widow, which will recommend it to the consideration of the court. There is no introductory clause, such as is usually found in wills, directing the payment of debts. The bequest, therefore, has nothing about it of a residuary character. The only disposition made of the personalty, is in favour of the widow, to whom the whole is given. His intention clearly was to provide for her out of the personal estate, and it is a settled rule that effect must be given to a will, so as make every legacy operate if possible; but that intention must be *frustrated, and the rule of [*233] law violated, if the personalty is to be swept away for the payment of debts. To give a legacy a specific character, so far at least as to exempt it from the burthen of debts, it is not necessary that it should be of a particular article. The same effect may be produced by a general bequest of the personalty. Preston on Leg. 83; Ward on Leg. 18. A bequest of all the testator's personal estate at W. is specific, and will pass all his personal estate at W., even what was not there when the will was made. *Sayer v. Sayer*, 2 Vern. 688. To apply the personalty in this instance to the discharge of the debts, would be in the highest degree hard and unjust. The heirs of the real estate acquired after the making of the will, are also the devisees of nearly the whole of the real estate of which the testator was seised when he executed that instrument; and they ask to have the debts paid wholly out of the personalty, so as to exonerate their estate from charge, while the widow, for whom the testator intended an ample provision, is left wholly destitute. This could not be done even in England, where the heir is so much favoured, and still less can it be done in Pennsylvania, where realty as well as personalty is assets for the payment of debts, and where both descriptions of property flow in the same channel of descent. There is therefore no reason for burthening the latter in exoneration of the former. *Ruston v. Ruston*, 2 Dall. 245; s. c. 2 Yeates, 54-70. If there is a plain implication of an intention to exempt the personal estate, it shall be exempted. *Walker v. Jackson*, 2 Atk. 624. In that case the controversy was between those who claimed the personal and those who claimed the real estate under the will, which distinguishes it, favourably for the appellant, from the present case, in which the effort is to charge the real estate not embraced by the will, which being left by the testator undeviseed, he evidently intended should bear the burthen of his debts. To cast them upon the personal estate bequeathed to the widow, would be virtually to revoke the will. Even a residuary bequest has been held to be specific, and creditors who claimed to be paid out of the personalty, turned

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over to the realty. *Adams v. Meyrick*, 2 Atk. 626, note. If the debts be great, the bequest of the personal estate would come to nothing, which, it is said, the law deems the worst construction that can be given to a will. *Wainwright v. Benlows*, 2 Vern. 718. Where the intention of the testator is to make provision for his widow or children, it must, if possible, be carried into effect. Thus where the testator devised to his wife an estate encumbered by a mortgage, and the personal estate was insufficient to pay it off, Lord Hardwicke decreed that the estate of the wife should be exonerated out of the real estate which descended to the heir; reversing his former decree as to this point, after a year's consideration. *Galton v. Hancock*, 2 Atk. 436. A legacy to a wife in lieu of dower does not abate with other legacies. *Davenhill v. Fletcher*, Ambler, 244. In *Bamfield v. Wyndham*, Prec. in Ch. 101, land was devised to trustees to sell and pay debts, and to pay the overplus to the testator's sisters. All the personal estate was bequeathed [*234] his wife, but the amount of debts exceeded the value of the personalty, and the lord chancellor said he must mean that his widow should have it exempt from debts or he must mean nothing. And in *Leffert v. Carter*, 1 Ves. 499, real estate devised to a son was subjected to the payment of a daughter, who would have been unprovided for, if the personal estate had been applied to that object.

That the testator intended that the real estate acquired after the execution of the will should be the fund for the payment of his debts, is to be inferred from his making no disposition of it, but leaving it to descend according to law. This fund is always resorted to where it is necessary, in order to give effect to the dispositions of the will. *Hayes v. Jackson*, 6 Mass. Rep. 151; *Livingston v. Livingston*, 3 Johns. Ch. R. 148, 153; *Livingston v. Newkirk*, Ib. 319. In *Hanby v. Roberts*, Ambler, 128, Lord Hardwicke says, the rule is clear, that where there are debts by specialty and legacies, and no devise of the real estate, but it descends, if creditors exhaust the personalty, the legatees may stand in their place, and come upon the real estate, against the heir at law. In that case, too, the legatee appears to have been a stranger. It is the constant rule, to put legatees in the place of creditors, when the latter exhaust the personal estate. The only description of legatees, who are not entitled to have the lands applied, are residuary legatees. *Burton v. Pierpont*, 2 P. Wms. 81; *Rider v. Wager*, Ib. 335; *Tipping v. Tipping*, 1 P. Wms. 729; *Clifton v. Burt*, Ib. 678; *Sigourney v. Jackson*, 6 Mass. Rep. 149. The case of *Commonwealth v. Shelby*, 13 Serg. & Rawle, 348, greatly resembles this. There the testator made certain specific bequests of personal property to his widow,

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and devised his real estate to his sons, giving pecuniary legacies to his daughters, and charging both his real and personal estate with the payment of debts and legacies. He also left real estate which did not pass under the will, and the rules laid down for the administration of the assets were 1st. That the specific bequests to the widow were to remain untouched. 2d. That the residue of the personal estate was then to be applied to the payment of the debts. 3d. That the lands descended were to be applied to that object, and, lastly, the lands devised. The only difference between this case and the one under consideration, is, that in the former the bequest to the widow was of certain portions of the personal estate, while in the latter, the whole was given to her. The only question therefore is, whether the bequest to Mrs. Walker is specific, and the authorities already cited show that it is.

Atherton and Binney for the appellees.—The primary fund for the payment of debts in Pennsylvania is personal estate. Real estate is only a contingent fund, and whoever endeavors to maintain an opposite position, must establish an exception to the general rule. The exception attempted to be proved in this case is, that the legacy to the wife is specific, and it is contended that where the personalty is specifically bequeathed, and there is descended real estate, the latter, in equity, must bear the burden of debts. The basis of this argument *is an as- [*235] sumption that the legacy to Mrs. Walker is specific, which is a mistake. There are two descriptions of specific legacies in the understanding of an equity lawyer. The first, where a particular thing in the possession of the testator at the time, and capable of being delivered in specie, is separated from the general mass of the personal estate. 1 Roper on Leg. 149, 155, 184; Preston on Leg. 69, 82, 83, 85. The second, a general bequest with this qualification, derived from the intention of the testator, that other property is made to bear the charge, which in ordinary circumstances would belong to the property bequeathed. The essence of bequests of this sort is, the intention that the legatee shall take clear of all charge. This is the chancery sense of a specific bequest. That the bequest to Mrs. Walker was specific in the first or common law sense of the term, cannot be contended for. It has no feature belonging to that class. It comprehended all the personalty which the testator then had, or might have at the time of his death. There is no limitation of time, place, or amount. Preston and Ward both show that there must be some restriction; an enumeration of particular articles at the commencement of the bequest comes to nothing, when followed by a sweeping clause giving everything.

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There is no authority to show that any part of such a bequest is specific. The authorities all prove it to be general. *Bowman v. Reeve*, Prec. in Ch. 577; *Attorney-General v. Parkin*, Amb. 566; 1 Meriv. 198, 211. There is in fact scarcely any general bequest of personal property in which there is not some enumeration of particulars. *Todd v. Todd*, 1 Serg. & Rawle, 453, was a much stronger case than this, yet there the legacy was held not to be specific. It is clear then that this case does not come within the common law sense of a specific legacy.

In relation to the chancery sense of the term, there was in early times some conflict of authority, but the doctrine has now settled down. There is, however, no conflict of authority respecting the rule in its application to this case. It is said, that the legacy is specific, by reason of an inference from other parts of the will, that the testator intended that this part of his estate should not be charged. There is nothing in the will to show an intention to exempt the personal estate from the debts, and put them upon the lands. Such an intention is not to be made out by fanciful conjecture. It must appear either from express words, or arise from necessary implication; it must be an intention not merely to charge the realty, but to discharge the personalty. 1 Madd. Ch. 588; 1 Roper on Legacies, 475, 484, and the cases there cited. In the will in question, there is no charge upon the land, and there is no case, in which, where there are no express words of exemption, an intention to exonerate the personalty has been inferred, without a charge upon the realty, or a trust to sell for the payment of debts. All the devises in the will of Samuel Walker, except that to the widow, are specific. They are to trustees, who have no power to sell or to mortgage, and there is not a syllable in the whole instrument indicating an [*236] intention, that the widow was to enjoy her legacy discharged of debts. If it be said, he had no debts, then the subject was not in his mind at all, and he could not have intended to charge the land with what did not exist; still less could he have intended to cast such a charge upon land, which did not then belong to him. If his mind was not directed to the subject, the whole argument is destroyed, for it is altogether a question of intention. The opposite argument goes the whole length of saying, that every general bequest of personalty is specific as regards everything but the real estate specifically devised, and throws the debts on the estates which descended. If the descended estates are to be charged, it must be by operation of law, and not by force of the testator's intention. If there was no intention on the subject, when the will was made, the acquisition of real estate afterwards, without republication of the will, cannot alter the state of things at the execution of

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the instrument. The acquisition of lands, on which the mind was never brought to bear, affords no argument in favour of intention. Nor does the position of the bequest in the will, its being first named, afford the slightest inference that he intended it should be first paid; nor is the circumstance, that the legacy is to the widow, sufficient to overrule the principles of law, which have made the personal estate the primary fund for the payment of debts. The absence of a clause directing that his debts shall be paid, furnishes no presumption, that he intended they should not be paid out of the natural and proper fund, the personal estate. In contemplation of law, such a clause is in every will, because in Pennsylvania all property is liable for debts in the order prescribed by law.

The opinion of the court was delivered by

ROGERS, J.—Samuel Walker, on the 1st day of March, 1820, made his last will and testament, and devised and bequeathed unto his wife, Elizabeth Y. Walker, his two messuages and lots, situate on the south side of Sassafras street, between Delaware Front and Second streets, in the city of Philadelphia, with the appurtenances; also all his household goods and furniture, moneys, bonds, mortgages, outstanding debts due and owing to him, and all other his personal estate, of what nature or kind soever.

He devised to Thomas Betts and Joshua Canby, and the survivors of them, &c., certain other messuages, and lots of ground, (particularly describing them,) in trust for his son Samuel Jones Walker, &c., and after his decease, in trust for his children, &c., and for want of children, then for the separate use of his daughter, Ann D. Harper, &c.

He also devised to the same trustees certain other messuages, tenements, and lots of ground, &c., in trust, for the separate use of his daughter, Ann D. Harper, &c.

And lastly, he, the said Samuel Walker, wished it to be understood as his will and intention, that the husband of his said daughter, Ann *D. Harper, shall not in any event, nor [*237] by reason of any cause, ways, or means whatsoever, have any right, claim, or interest in his estate, in right of his wife, or otherwise, nor receive any benefit or advantage therefrom.

These devises included the whole property of the testator, at the time, but subsequent to the date and making of the will, Samuel Walker acquired certain real estate. The testator died the 1st day of December, 1824, without having republished his will, or adding any codicil thereto, disposing of the said real estate, which of course descended to his heirs at law.

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The testator being indebted to various persons, the executors made an application to the Orphans' Court, praying an order to sell the descended lands for the payment of debts, Elizabeth Y. Walker, the widow and legatee, claiming all the personal estate of the testator, alleging, that the bequest to her is specific, exempted from the payment of debts due by the testator, and that the payment of them devolves upon the land descended to the heirs. The question between the heirs and the legatee is, which fund is primarily liable for the payment of debts.

It is a general rule, that in the absence of a contrary intention, the personal estate is the first and natural fund for the payment of debts. But the testator may substitute the real fund in the room of the personal, which may be done, either by express words, or by a plain intention manifested by the different provisions of the will.

The counsel, for the appellants, contend, that the lands descended, are primarily liable on two grounds.

First. That the legacy to the wife is specific, and *secondly*, That it is manifest, the testator intended, that she should have the legacy, exempted from the payment of the debts.

A regular specific legacy may be defined, the bequest of a particular thing, or money specified and distinguished from all others of the same kind, as of a horse, or piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor. 1 Roper, 149.

There are also, bequests of general personal estate, which are sometimes specific, as when the thing given is distinguished and separated from the general estate, and specifically bequeathed, and capable of being delivered in specie. Thus, if A. bequeath to B. all his personal estate at C. or in a particular house, or country, the legacy will be a specific. So a bequest of all the goods, &c., in a particular place, or of all the goods and chattels in a described country, or of all plate, linen, and furniture in the testator's house at A. or which shall be therein at the time of his decease; in such cases the bequests are specific, for they are confined in their extent, and fall within the description given of such legacies. The money, goods, &c., are so described by the testator, as to authorize the legatee to say to the executor, deliver the sum bequeathed to me, which is in a particular chest, bag, or purse, or the goods which are in a particular room, or [*238] or which are there at the time of his decease. *Sayer v. Sayer*, 2 Vern. 688; *Prec. in Ch.* 392; 5 Ves. 150, 156; *Nesbitt v. Murray*, 8 Ves. 617, 623; *Sadler v. Turner*, 1 Bro.

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C. C. 129, 127 ; Moore v. Moore, 2 Vern. 538 ; Gayre v. Gayre, 2 Vern. 747 ; Shaftesbury v. Shaftesbury, 1 Roper, 185.

But, when the language of the bequest is such that neither by reference to any collateral thing, can the money bequeathed be distinguished from the testator's other moneys, nor a clear intention be perceived to give a specific part of his personal estate, such a bequest will be general. It does not fall within the description which has been given of a regular specific legacy. The legatee is unable to point out to the executor any particular sum of money, or chattel, that he can call his own, as he had the power to do in the instances enumerated. The legacy, therefore, must necessarily be general. Since then a bequest of personal estate requires, as before mentioned, to be limited or controlled to some particular place, or to be referred to, as in some person's hands, in order to make it specific, it follows, that if there are no such restrictive expressions, a legacy of personal estate generally will be general. A bequest of all a person's personal estate generally is not specific. The very terms of such a bequest show, that it is general, and even, if the real and personal estate were devised as here, neither the circumstance of the bequest of the personal property being in the same sentence as the real, the devise of which is necessarily specific, nor the circumstance of the real and personal being disposed of together, would be sufficient to constitute the disposition of the general personal property a specific legacy. 7 Ves. 137, *Howe v. The Earl of Dartmouth*.

And what is this bequest but a disposition of all the personal estate of the testator? He bequeaths to the legatee all his household goods, and furniture, moneys, bonds, and mortgages, outstanding debts due and owing to him, and all his personal estate of what kind or nature, soever. He first enumerates the particulars of which his personal property consists, and then closes the sentence with a sweeping disposition of all his personal estate. It is as strong, but not more so, as if he had said, I give all my personal estate of what kind or nature soever, to Elizabeth Y. Walker. The enumeration of particulars does not affect the generality of the bequest. Precedents in Ch. 577 ; Amb. 566 ; 1 Merriv. 198. In the argument of the last case, the counsel say, in regard to the enumeration of articles, with which the clause in the will is introduced, he did not wish to be mistaken in contending, that such an enumeration alone will render a bequest specific. The whole bequest must be taken together, for the intention of the testator on this subject, as in every question on the construction of wills, is the principal object to be ascertained. It is, therefore, necessary, that the intention be either expressed in reference to the thing bequeathed,

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or otherwise clearly appear from the will, to constitute [*239] *the legacy specific. The presumption, both in law and equity, is in favour of general legacies, unless it can be clearly ascertained by the will, that the testator intended to confer on the legatee some article, of which he was at the time of making the will, possessed. And this is a rule of construction adopted for the benefit of the legatee. *Amb.* 310; *Ellis v. Walker*, 4 Bro. C. C. 345; *Simmons v. Vallance*, *Ambler*, 56y; *Attorney-General v. Parkin*, 1 Ves. Sen. 425; *Avelyn v. Ward*, 4 Ves. 555; *Chaworth v. Beach*, 4 Ves. 568; *Innes v. Johnson*, 1 Swinb. 244; *Sibley v. Perry*, 7 Ves. 522; *Gillman v. Addely*, 15 Ves. 388.

It cannot be contended, with any hope of success, nor has it been attempted, that the testator intended to confine the bequest to his wife, to the property which he possessed at the making of the will. There is nothing in the will which indicates such an intention. And yet, specific bequests as defined, are gifts, by will, either of some particular thing, or part thereof, or of some specified or identical fund, or article, or part thereof, of which the testator was possessed, at the time of making his will, so as clearly to point out, what, in particular, was intended for the legatee. *Preston on Legacies*, page 83, and *Ward on Legacies*, 18, and the authorities there cited. Had the lands, which are specifically devised, been sold by Samuel Walker in his lifetime, and converted into money, Elizabeth Y. Walker would hardly have contended that this was a specific bequest, which operated only on the personal estate of which the testator was possessed at the date of the will. In such a case we are warranted in believing she would have claimed all the personal property left at the death of the testator. And this, in effect, she does now. She never attempts to discriminate between the estate, held at the date of the will, and the estate of which he died possessed. She claims the whole personal effects, to which, for aught that appears, she is only entitled as a general legatee, and at the same time calls in the aid of the descended lands, on the ground that the legacy to her is specific, and not liable to the creditors, until the descended lands are exhausted.

The general rule in marshalling assets, so far as regards this case, is thus settled. 1st. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. 2d. The real estate which is appropriated in the will as a fund for their payment. 3d. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired. It has been shown, that the legatee has no right to claim an exemption of the personal assets, on the ground that the bequest to her is specific. The next inquiry will be,

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whether anything appears, which shows an intention on the part of the testator, to exempt his personal estate from the payment of debts. In order to exonerate this personal fund, the will must contain express words for that purpose, a clear, manifest intention, a plain declaration, or a necessary inference, tantamount to express words. The question, in each particular case of exemption, resolves itself into this: Does there appear from the *whole testamentary disposition, taken together, an intention on the part of the testator, so expressed, as [*240] to convince a judicial mind, that it was meant not merely to charge the real estate, but so to charge it, as to exempt the personal? For it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided. There is nothing in the will of Samuel Walker, clearly, which manifests an intention to charge his real estate with the payment of his debts, nor would that be necessary, as between the legatee and the heirs of the land descended, provided it was manifest he intended to exempt his personal estate; and this is the great difficulty with which the legatee has to contend. And this intention we are required to infer, from something which has occurred since the date of the will. The testator disposed of all his property, real and personal, and as between the devisees in the will, it is not to be questioned, that the personal estate would be liable to the debts. It would be a singular construction, to infer an intention to charge lands with the payment of debts, which the testator acquired after making his will; and the case of *Hayes v. Jackson*, 6 Mass. R. 149, decides that a testator cannot, in his will, charge after purchased land any more than he can devise them. The case which bears the strongest analogy to the present, is the one just cited. The rule as laid down by Chief Justice Parsons, is applicable here. The case was this: The testator ordered his debts to be paid; made a specific devise of certain lands to his sister, and devised all the residue of which he should die seized, to a residuary devisee. He died seized of lands purchased after the making of the will, which, of consequence, did not pass. The executors applied for license to sell real estate for the payment of debts. The court directed them, first to sell the devised lands not included in the specific devise, and next, the lands which descended to the heirs. The Chief Justice says, "Jackson first provides that his debts and funeral charges be paid; he next bequeaths legacies to his nephews and nieces, and makes a specific devise to his sister Susannah Gray. Then he gives to Mrs. Swan, in fee, all the remaining part of his estate, real and personal; the just construction of which is, when my debts and funeral charges, and the legacies are paid, and the specific devise to my sister is deducted,

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then what remains, whether real or personal, I devise, in fee, to Mrs. Swan." In one respect, this is a stronger case than the present, for here the court ordered the real, as well as the personal estate, devised to Mrs. Swan, to be sold, before the descended lands. A distinction has been attempted between the cases, and it is true, that they are not in every feature exactly alike, which, indeed, is seldom, if ever the case in precedents on the construction of wills. It is objected, that here there is no direction to pay debts, and that this is the case of a primary, and not a residuary devisee. To this I answer, that every testator is presumed to know the law of the country in which he lives, and to make his will in reference to it. The estate of the testator is equally bound, without as with such a direction, and in the order that [*241] usual, is by no means necessary in Pennsylvania. The personal fund is the first in order for the payment of debts, whether mentioned in the will or not, and this is not doubted, as between the devisee of the real estate and the legatee, and how it can make any difference as regards the heirs of the descended lands, I am at a loss to discover. It is hardly necessary to quarrel about terms, but Elizabeth Y. Walker is nothing more or less than a residuary legatee. The intention of the testator, at the time of the making of the will, most certainly was, that after his debts and funeral charges were paid, then what remained he bequeathed to his widow and legatee. If nothing remained, then nothing is bequeathed to her. It cannot in any sense be considered as a specific bequest of the remainder to her. The law creates the fund for the payment of the debts, and the testator bequeaths to her what remains, after satisfying the requisitions of the law. If this be the true reading of the will, then Elizabeth Y. Walker will get precisely what the testator intended she should have, viz. : all that remained of his personal estate, at the time of his death, after payment of the charges which the law imposes on the fund. And here it is material to observe, that this bequest is neither specific in the legal sense, nor in the sense in which it is sometimes so considered by a court of chancery. The amount of the bequest is not ascertained in the will. Whether more or less, depended upon the state of his property at the time of his death. It is not then specific as regards quantity or amount. In this respect it differs from an ascertained specific legacy, as, say a legacy of five hundred pounds to A. It is to the latter class of cases, that Lord Hardwicke refers, in *Galton v. Hancock*, when in speaking of the case of *Clifton v. Burt*, 1 P. Wms. 678, he says, "This case proves that even general pecuniary legatees are to be preferred to an heir at law, much more a specific devisee of land, and this, too, in analogy

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to the rule of law ; for every devisee is in the nature of a purchaser, and so it is laid down in Herbert's Case, 3 Co. 12, that the heir shall not have contribution against any purchaser, although, in *rei veritate*, the purchaser came to the land, without any valuable consideration, for the consideration of the purchase is not material in such a case." Tipping v. Tipping, Ib. 729.

A court of chancery considers the bequest so far specific, as to throw the debts of the deceased on the lands descended ; and it is difficult to discover any difference between such a bequest, and a bequest of a specific chattel. The testator indicates his intention that the legatees should have the one, as strongly as the other, and it is on the principle of intention, that in marshalling the assets, the court directs the creditors, who have liens upon two funds, to exhaust the lands descended, before they levy on the personal estates specifically devised.

This is a contest between the legatee and the heirs of the testator, and not, as has been alleged, between her and the husband of Ann *D. Harper. It is true, that by this decision, [*242] he will acquire an interest in the estate, for life, and if this was real estate, which the testator owned, and which he had in contemplation when he made his will, there would be some strength in the argument. It would be wandering in a labyrinth of conjecture, to speculate about the reasons which prevented the testator from republishing his will, and disposing of his after-acquired property. Nor can we be expected to deprive the heirs of the fee simple of the estate, merely in order to prevent the husband of one of them from acquiring an interest in it. Such a construction would, in all probability, defeat the general intention of the testator, for no person can read the will without perceiving that the children are as much the objects of his bounty, as the widow. But however strongly the testator may indicate his intention to exclude the husband of his daughter, it may be doubted whether this will affect after-acquired real estate. This principle is explicitly declared in Hays v. Jackson, 6 Mass. R. 156. The testator cannot, in his will, charge with the payment of his debts, after-purchased lands, any more than he can devise them.

Decree of the Orphans' Court affirmed.

Cited by Counsel, 4 R. 328 ; 2 Barr, 468 ; 4 Barr, 90 ; 12 H. 22, 176 ; 6 C. 80 ; 2 Wr. 196 ; 9 Wr. 384 ; 5 S. 237 ; 25 S. 198 ; 1 W. N. C. 522.

Cited by the Court, 10 Barr, 273 ; 1 H. 264 ; 24 S. 396 ; 8 N. 405, s. c. 7 W. N. C. 10 ; 7 O. 576.

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APPEAL.

The original and all the supplementary accounts of an executor constitute parts of one whole, and taken together, contain an exhibit of the proceedings of the executor in relation to the estate; and although it may sometimes be expedient to file exceptions to the different accounts, as they are from time to time settled, yet it is unnecessary to do so, the whole being open to exceptions, until the final adjustment of the estate.

The Orphans' Court ought, therefore, on the final settlement of the estate, to examine into the subject-matter of the exceptions then filed to the preceding accounts, although the settlement of such accounts may have been duly published, confirmed *nisi*, and afterwards confirmed absolutely, in consequence of no exceptions having been filed within the time prescribed by the rules of court.

It seems, however, that if the parties have been heard in the Orphans' Court, a re-investigation by that court cannot be required, except, perhaps, on a petition in the nature of a bill of review, which can only be necessary after the final decree.

No appeal lies from the decree of the Orphans' Court to the Supreme Court, except upon the settlement of the final account of the estate, and upon the appeal, the Supreme Court may examine into the exceptions to the original and supplementary, as well as the final account. The appeal brings up the whole case for examination.

What is a final decree of the Orphans' Court on an administration account.

It seems, the Orphans' Court may make a final decree, so as to discharge the executor, although there may be outstanding debts due the estate, but this should be done with great caution, and not without express notice at least to the legal representatives.

Where a son continues with his father after he has arrived at full age, and is supported by him, without any contract to be paid for his services, but with a view to a provision by will, he cannot, in general, after the death of his father, support a claim against his estate, for a compensation for labour, &c. It must be a strong case to induce the court to listen to such a claim.

And where the services were rendered at so distant a period as to be barred by the act of limitations, and a settlement appears to have taken place between the father and son, it is to be presumed, that all accounts between them were settled, and the son cannot afterwards, as his father's executor, take credit for such claim in his administration account.

Still less can he do so, where it appears, that at the settlement, the claim was asserted by the son, and withdrawn on being objected to by the father.

Where this court has any doubts as to the facts of a case, coming before it on an appeal from the Orphans' Court, it will direct an issue to try them; but it will refuse to do so, where the parties have had abundant time to furnish the court with the necessary testimony, and the facts, from what appears to the court, are involved in no doubt.

Interest cannot be allowed to an executor on the balance of his administration account, where the effect of it is, to give him compound interest, which cannot be permitted under any circumstances.

THIS case came before the court on an appeal from the decision of Kennedy, J., holding a circuit court for *Chester*

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county, on the 24th August, 1831, affirming *pro forma*, and without prejudice, the decree of the Orphans' Court of that county.

After argument by *Dillingham*, for the appellants, and *Bell* and *Tilghman*, *contra*.

*The opinion of the court, which presents all the material facts and the points of the case, was delivered by [*244]

ROGERS, J.—On the 20th March, 1821, Thomas Walker, who was the executor of Joseph Walker, filed an account in the Office of the Register of Chester county, which on the 30th of April, 1821, was confirmed *nisi*. It is headed, "The account of Thomas Walker, one of the executors of Joseph Walker, late of the township of Tredyffryn, in the county of Chester, deceased." The account, among other items, contains the following. "By balance due from Joseph Walker, the testator, to the accountant per settlement, 12th of twelfth month, 1817, three thousand seven hundred and sixty dollars. By interest thereon, from thence to the 29th of third month, 1821, seven hundred and thirty-three dollars and twenty cents. By amount due from the said deceased to the accountant for labour and superintendence, from the 29th of twelfth month, 1778, till 29th of third month, 1789, being ten years and three months, at one hundred and twenty dollars per year with interest thereon, till the 29th of third month, 1821, three thousand nine hundred and thirty-three dollars and sixty cents." The accountant charges himself with one thousand two hundred and one dollars and sixty-eight cents, and takes credit for nine thousand three hundred and sixty-six dollars and fourteen cents, showing a balance against the estate of eight thousand one hundred and sixty-six dollars and forty-six cents. On the 20th March, 1824, he filed in the same office, a supplementary administration account, which was confirmed *nisi*. It is headed, the "Supplementary administration account of Thomas Walker, one of the executors of the last Will and Testament of Joseph Walker, late of the township of Tredyffryn, in the county of Chester, deceased." The account, among others, contains the following items: "By balance, former account filed and confirmed, eight thousand one hundred and sixty-six dollars and forty-six cents, three years interest on the said balance, one thousand four hundred and sixty-nine dollars and ninety-seven cents." The accountant charges himself with eight thousand four hundred and forty-nine dollars and fifty cents, and takes credit for twelve thousand five hundred and eighteen dollars and seventy-eight cents, leaving a balance of four thousand and sixty-nine dollars and twenty-eight cents. Part of this viz., eight thou-

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sand four hundred and twelve dollars and sixty cents, was the proceeds of certain real estate, sold by the executor, for the payment of the ascertained balance in the former account. On the 8th May, 1828, upon the application of Joseph Walker and John Malin, guardians of the minor children of Hannaniah Walker, deceased, a citation issued from the Orphans' Court to the executor to settle a further account. On the 8th August, 1828, he settled an account in the Orphans' Court, and the court granted leave to 8th September to file exceptions. It is headed, "The resupplementary account to Thomas Walker, one of the executors of the last will and testament of Joseph Walker, late of the [*245] township *of Tredyffryn, in the county of Chester, deceased." The accountant charges himself with the proceeds of certain real estate, sold for the payment of the balance in the second administration account, and also with articles taken by him at the appraisement, and which remained unsold. He prays an allowance for interest on four thousand sixty-nine dollars and twenty-eight cents, the balance due, in the former settlement, four years, two months, and twenty-four days, amounting to one thousand thirty-three dollars and fifty-six cents. All the accounts were advertised in the usual manner. On the 8th September, 1828, the guardians filed distinct exceptions to the original account of 26th March, 1821, to the supplementary account of the 30th March, 1824, and to the resupplementary account of the 20th June, 1828. They also filed additional exceptions to the accounts in which they impute fraud to the executor. On the 9th March, 1829, after argument, the Orphans' Court ordered the exceptions to the original account of 1821, to be dismissed, and that the supplementary account of 1824, and the resupplementary account of 1828, with the exceptions should be committed to auditors. On the report of the auditors, on the 5th June, 1829, it appeared, there was a balance due the accountant of nine hundred and twenty-seven dollars. On the 9th June, 1829, the report was read and confirmed *nisi*. On the 3d August, 1829, exceptions were filed to the report of the auditors, and on the 6th February, 1830, the Orphans' Court made a decree, from which, on the 22d February, 1830, the guardians appealed to the Circuit Court. On the 22d August, the appellant filed the following exception :

The court erred in dismissing the exceptions to the original account, and in allowance of interest upon the balance of that account, in each of the supplemental accounts ; said exception being based upon an allegation of fraud against the executor.

On the 24th August, they filed an additional exception :

The appellants except to the item of three thousand nine hundred and thirty-three dollars and sixty cents, for which a

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credit is claimed, in the first account, and to the interest claimed on this sum, in each of the subsequent accounts, the same being claimed in the face of a settlement between the executor and testator, set forth in the preceding item; waiving all other exceptions.

The executor also filed exceptions to the decree.

The 24th of August, 1831, Justice Kennedy, holding a Circuit Court for the county of Chester, overruled the exceptions of both parties, *pro forma*, and without prejudice, and affirmed the decree of the Orphans' Court, and on the same day both parties appealed. With a view to a hearing in the Supreme Court, the 8th of March, 1830, a rule was granted for a commission to take depositions of witnesses for either party, on twenty days' notice to the opposite party.

The counsel for the guardians allege, that the Orphans' Court were in error in dismissing the exceptions to the original account; and upon this point, the cause has principally turned. A view of this question *also involves the right of the Supreme Court to investigate the accounts; for if we [*246] have the power, although the Orphans' Court may not, the objection will avail the executor but little. The Orphans' Court decided that they had no right to grant relief, because the account, being confirmed, it was no longer open to exception.

The original supplementary and resupplementary accounts, constitute parts of one whole. Taken together, they contain an exhibit of the proceedings of the executor, in relation to the estate. Viewing it as an entire transaction, as but one account, it is difficult to imagine any good reason why more sanctity should be given to one part than another. The law contemplates a final settlement of the estate in one year; but as this, in a variety of cases, is obviously impracticable, the legal representatives, and the creditors who are interested in the management of the estate, have a right to require from time to time an account of the administration of the assets. This is indispensable, for without this remedy, the court could not be judicially informed, whether the assets were in a course of correct administration, or not; nor could the interest of the creditors, and others, be protected. And hence, the necessity, in some instances, of two or more settlements, as the exigencies of the trust may require; which by no means will be an idle and expensive ceremony, as has been argued by the counsel for the appellee; and this was the opinion of the Supreme Court, as to guardians, (who are in some respects in a similar situation,) in *Bowman v. The Executors of Herr*, 1 Penn. R. 284. By the settlement, the parties interested have an opportunity of knowing the situation of the estate. If there is reason to apprehend injury to their interest,

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timely measures may be taken to guard their rights. Until there is an exhibit of the whole estate, we cannot perceive the necessity, although it may sometimes be expedient, to file exceptions. It would frequently be an injury to executors and the legal representatives, to require a different proceeding. Many seeming errors cease to be such, on a final settlement. Mistakes may be corrected, omissions supplied, and charges, wearing the appearance of extortion, may be deemed but a bare compensation for the services rendered by the executor. It has been said, that the delay consequent on the rule, will lead to unnecessary litigation, to much inconvenience, and to danger of injustice. There is, I am persuaded, no reason to apprehend any such results. On the contrary, it is a recommendation with me, that it will prevent the litigation and prove more convenient to courts and suitors. Where is the inconvenience or danger which will arise from keeping an account open to exception, until the final adjustment of the estate? And if there be, is it one to which the executor has voluntarily exposed himself, not without compensation, and which results from the nature of the trust? We are not to suppose that a person charged with so important a trust, will be so careless of the necessary receipts and vouchers, as to incur danger on that account, and if so unlikely a thing should occasionally happen, it is not the fault of the legal representatives [*247] or the creditors. *It is seldom required that anything more should be preserved, than receipts for disbursements; and surely it is asking nothing that is unreasonable, that such vouchers should be preserved. Besides in cases of real difficulty, every circumstance will be duly weighed and properly appreciated by the Orphans' Court, aided as they may be by the explanations which the executor may be permitted to give of the management of the estate. Every point will be duly considered, and if it should appear, (as there is but little to apprehend, where the executor exercises common prudence,) that an undue advantage is attempted to be taken by an artful and interested individual, the court will afford the necessary protection. No court should be anxious to guard a man from the loss which arises from carelessness and inattention, in conducting a business so important, as that entrusted to an executor. Besides, if danger should be apprehended from delay, this may be a stimulus for a speedy final adjustment of the accounts; and if such should be the result, it will prove an essential service in the settlement of decedents' estates. Procrastination is one among the evils to which persons interested in such estates are most exposed; and it is a strong argument in favour of the policy of the act of the 8th of February, 1819. It is true, that from an early period in the judicial history of Pennsylvania, it has been

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the peculiar province and duty of the Orphans' Court to examine and pass upon administration accounts, to allow and disallow, to revise and confirm them after they have been first settled by the Register, subject to the right of appeal to the Supreme Court. This business was frequently done *ex parte*; and this, among other reasons, gave rise to the act of the 4th of April, 1797, which directs notice to be given in the manner prescribed in the act. And it is equally true, that defects in the existing law, again induced the legislature to turn their attention to this interesting and all-important branch of our jurisprudence; and on the 8th of February, 1819, it was enacted, "that when the accounts of guardians, executors, or administrators shall be finally settled according to law, and the same confirmed by the court, no appeal shall be taken therefrom, unless the same be entered in one year after the said confirmation." The meaning of the term "finally settled according to law," required judicial construction, and was considered in M'Grew's Appeal, 14 Serg. & Rawle, 397. The words, "finally settled," says Justice Huston, "cannot be fairly applied to any other than a final account." In this opinion we all concurred, and, since that decision the court has been in the constant practice of dismissing an appeal taken to a partial account. We have construed the act, not merely as a limitation of the right of appeal, to one year after the confirmation of the final account, but as a legislative declaration, that no appeal shall be taken, unless the account is final. And this construction was necessary to effectuate the intention of the act, for otherwise a final settlement would be limited to one year, but to a partial account there would be no limitation whatever: Taking the whole as but one account, seemed not only to be in conformity *to the act, but greatly tending to the ease of the [*248] suitors, and the advancement of justice. The court is more competent to decide a cause, with a view of the whole ground, than they possibly could be, if presented to them in detached parts. This, so far from increasing litigation, will have a tendency to diminish law-suits, by expediting the final settlement of accounts, and investigating and ending the whole controversy in one suit. And this is in analogy to the whole course of judicial proceedings, for the Supreme Court uniformly refuses to review the decisions of the inferior courts, until there is a termination of the cause in the court, of whose judgment the party complains. If finally settled according to law, (the terms used in the act of the 8th of February, 1819,) mean, as has been decided, a final settlement; and we were correct in saying, that an appeal would not lie until there was a final settlement, it follows, that we must examine into the exceptions to the original account, otherwise the legal representatives and the

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creditors would be precluded from a review altogether. And in several instances this has been done in the Supreme Court. There can be no reason for more than one appeal by the same party, for this brings up the whole case for examination. The accounts are but component parts of one whole. Why then, should the Orphans' Court refuse to examine the subject-matter of the exceptions, the consequence of which is to compel the party to seek justice by appeal? Here the accounts were presented, after giving due notice, and were confirmed *nisi* in the usual manner. We are aware, that the practice has been, upon proof of the due publication of the required notice, for the court to direct, as a matter of course, that the accounts thus presented, be allowed and confirmed, unless exceptions be taken within the time prescribed by the rules and practice of the Orphans' Court. If no exceptions be filed, it is taken as a judgment or decree by default, or by the acquiescence of the parties interested, after notice. The act of the 4th of April, 1797, be it remembered, does not require personal notice. A publication, thirty days before the time appointed for confirmation and allowance, in three of the most public places in the county, and in the register's office, is sufficient.

It would appear reasonable, that the Orphans' Court should incline to an investigation, which may, and in many cases will preclude the necessity of an appeal, which sometimes may be expensive, troublesome, and less satisfactory to the parties. At any rate, the chances (of which the suitors should not be deprived), are that fewer points will need the revision of the Supreme Court, if the parties have the opportunity of a hearing in the Orphans' Court. A confirmation *nisi* becomes absolute, unless exceptions are filed in due time, which is any period previous to the final adjustment and decree of the court. Had the parties been heard, it would have presented a different case. It would be unreasonable to require a re-investigation, unless perhaps on a petition in the nature of a bill of review, which can be only necessary after the final decree.

[*249] *We have next to inquire whether the administration account of the 26th of March, 1821, comes within the meaning of the act of the 8th of February, 1819. The executor files a supplemental account, without citation, which shows that he did not consider the first account final, nor do the accounts purport to be final. In this account, he charges himself with the proceeds of the real property sold for payment of debts, and takes credit for payments and disbursements made for the estate. When cited to settle a re-supplementary account, he does so without objection, and charges himself with the proceeds of other real estate, and also with part of the inventory, which

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remained in his hands unadministered. Nor is the decree of the court a final decree. There is nothing in the adjudication which will give it the character of a final adjustment of the estate. Although I will not undertake to say, that the Orphans' Court may not make a final decree, notwithstanding there may be outstanding debts due the estate, so as to discharge the executor, yet this should be done with great caution, and not without express notice, at least to the legal representatives.

The guardians except to the allowance for labour, and superintendence, from the 29th of December, 1778, till the 29th of March, 1789, ten years and three months, at one hundred and twenty dollars per year, with interest till the 29th of March, 1821. A settlement took place, as appears in the account itself, the 12th of December, 1817, and this of itself would be a satisfactory reason for disallowing a charge made by an executor. The presumption is, that all accounts between the parties were then settled, and in the face of such a settlement, it would require strong countervailing proof to support a claim barred by the act of limitation, by a son, who is the executor, against the estate of a deceased parent. We have not been given to understand that he had any means of support whatever, except what was derived from his father, and unless an express contract can be shown, there can be no precedent more dangerous than to permit a son to succeed in an attempt to avail himself of an account trumped up for the purpose of getting an undue share of the estate, at the expense of the other heirs. When a son continues with a father after age, it is usually done with a view to a provision by will. If disappointed, in perhaps his reasonable expectations, we cannot permit him to turn round, and attempt to retrieve his fortunes, by resorting to an account, on a *quantum meruit*, for services rendered the father in his lifetime. Every principle of policy should induce courts to be extremely cautious in sanctioning such claims; and it must be a strong case which will induce me to listen for a moment to such a charge. The labour of a son, after deducting the necessary expenses, may be easily estimated too high, and this of itself would be a sufficient reason to investigate the charge which the executor, after forty years, has thought proper to make against the estate of his father. The evidence, however, independent of the general principle, is too pointed and plain to admit of any doubt. William *Webb, a witness, who [*250] from what appears is altogether worthy of credit, says, that he was present at the settlement, as an agent of Joseph Walker, who was blind. Thomas Walker, the son, presented two accounts, one said to be a transcript from his books, the other for services rendered his father during the revolution,

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some thirty or forty years before. The account for services was first taken up. Joseph Walker alleged he did not owe him anything on that account. The witness asked Thomas, if there was any agreement or contract, between him and his father for wages. He said there was none. Joseph said, that it was true he was a good worker, but that he had a horse to ride, and that he went where he pleased. Joseph Walker then said, that he had been the means of getting the place from Parson Curry. He also said, "If thee must know, I am paying interest for money that stocked that farm for thee, now;" and he said, "I have never charged thee with it, and don't mean to." Thomas then said, "Father, thee says thee has not charged me, nor don't mean to." Joseph said, "I never have, nor don't mean to." Then, said Thomas, "We will let one account go against the other." A memorandum was then made of the settlement, which is in these words, "1817, December 12. This day Joseph Walker, and his son Thomas Walker, settled all accounts up to this time, as witness our hands; and the balance due Thomas is three thousand seven hundred and sixty dollars:"—Signed Joseph Walker, Thomas Walker, and witnessed by William Webb. The books of Thomas Walker have been referred to, in which an entry of the settlement was also made. I shall content myself with making no further remark upon it, than that it affords abundant proof of the truth of William Webb's statement in regard to the terms of the memorandum, and also shows the reason that Thomas Walker desired to get the memorandum of the settlement out of the possession of the witness. The counsel for the executor have requested the court to direct an issue, and if we had any doubts about the case, we would listen to the request, or if the parties had not had abundant opportunity and time, to furnish us with the necessary testimony. Nothing has been shown to impeach the credit of William Webb, in the slightest degree. We cannot permit mere allegations, without proof, to have any effect on our minds. So far from not having an opportunity to investigate the facts, the constant endeavour of the executor has been, to prevent any investigation at all, on the ground that the matter has passed in *rem judicatam*.

It remains now to notice the charge of interest upon the balance of the administration account. This, the court is of opinion, cannot be allowed. The effect of it is, to give the executor compound interest, which cannot be permitted under any circumstances. There would be few estates, which could stand a process such as the one attempted by this executor.

Cited by Counsel, 5 R. 329; 5 Wh. 61; 10 Barr, 410; 7 H. 142, 250; 1 C. 190; 3 C. 259; 8 C. 324; 7 Wr. 108.

Approved, in 5 W. & S. 515, and also 8 Barr, 216.

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Cited by the Court, 2 H. 202; 2 C. 471; 5 C. 469; 6 C. 473; 3 Wr. 189; in the latter case, Walker's Estate is overruled owing to the provisions of the Act of April 14, 1835.

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[*251]

M'Cready and Another *against* Freedly.

IN ERROR.

A covenant in a deed of partition between A. & B. that they shall at their equal and joint expense, cause the canal or race through their respective lots from the dam, &c., to be widened and improved in the manner therein specified, and the race and head gates at all times forever to be kept in order at their equal and joint expense, does not render them jointly liable for work done to the canal, &c., by order of A. alone, and it is error in the court to charge the jury, that the covenant in the deed of partition, and the fact of the work having been done, were some evidence of a joint agreement on the part of A. and B. with the plaintiff to do the work.

Nor are the declarations or admissions of A. without any authority being shown from B., to make a contract binding them both jointly, any evidence whatever of a joint contract.

Nor are the circumstances of B. having been frequently at the place when the work was done, and having his agents there, while it was going on, and saying nothing to the plaintiff to induce him to believe, that he was to look to A. alone for payment, any evidence of B.'s liability.

WRIT of error to the Court of Common Pleas of *Montgomery* county, in an action of *assumpsit* for work and labour done, and materials furnished, in which the defendant in error, Jacob Freedly, was plaintiff, and the plaintiffs in error, Bernard M'Cready and Samuel R. Wood, defendants. The defendants below pleaded *non-assumpserunt*, set-off and payment, upon which issues were taken.

Kittera, for the plaintiffs in error.

Rawle, Jr., for the defendant in error.

The opinion of the court was delivered by

KENNEDY, J.—On the trial of this cause, it appeared in evidence, that M'Cready and Wood had been the owners of, and held as tenants in common, a lot of land at Norristown in Montgomery county, through which a canal or race had been made to conduct the water from the Schuylkill river, and was used by them for manufacturing purposes. On the 30th of January, 1826, a partition by deed of that date was made and executed between them, and among other things in it, the following clause is contained: "They, the said Samuel R. Wood and Bernard M'Cready agree, that they, their heirs and assigns, at their

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"equal and joint expense, shall cause the canal or race through
"their respective lots from the dam to De Kalb street, to be
"widened so as to take in one-half of the river Schuylkill, when
"the water is at its lowest stage, and to be walled from the
"bottom to the height of six inches above the level of the water
"in the dam; which race and the head gates shall at all times
"forever be kept in order at the equal and joint expense of
"Samuel R. Wood and Bernard M'Cready," &c.

[*252] *This suit was brought to recover the price of work and labour done, and materials furnished for the accomplishment of the same, by Freedly, at this race mentioned in the covenant between Wood and M'Cready, in the deed of partition just recited. It was proved, that the work and materials were done and furnished by Freedly, and that he was employed by Wood for that purpose. Likewise that two persons, after the work was done, were appointed by Freedly and Wood, to measure it, who after doing so, and making out a bill of it, showed it to Wood, who asked for a copy of it to give to M'Cready, who, as he (Wood) said, was equally interested with him. There was also some evidence given, that M'Cready was frequently at the place and passing it, while the work was in progress, but he also had persons at work there or close by at the same time. There was no evidence given, which went in the slightest degree to show, that M'Cready had any knowledge or reason to suspect, that Freedly intended to look to him for payment, until after the work was done some time, and Wood had become unable to pay.

There was evidence given on the part of M'Cready, that he had employed and paid hands for walling and doing the work mentioned in the deed of partition on that part of the race opposite to his mill and allotment in the partition that was made, the amount of which was sixteen or seventeen hundred dollars. It was attempted on the part of the plaintiff below to rebut the effect of this last evidence by showing that he had done work for M'Cready in building or assisting to build a factory for him, and that in a suit brought by Freedly against M'Cready for this last work mentioned, he (M'Cready) claimed as a set-off this sixteen or seventeen hundred dollars, which he had paid for work done at his part of the race, because that Freedly by a contract in writing made with M'Cready and Wood jointly, in 1825, had undertaken to do all that same work in a particular manner, and had been paid for doing it, but failed to finish the work in the manner he had undertaken and agreed to do.

The court below in their charge to the jury, told them, that the covenant or agreement between Wood and M'Cready contained in their deed of partition, and which has been recited,

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taken in connection with the fact of the work being done by Freedly, was some evidence of an agreement on the part of Wood and M'Cready with the plaintiff below, to do the work for which this suit was brought. This part of the charge is the ground of the first error, which has been assigned.

This covenant or agreement between Wood and M'Cready is not in the nature of a partnership agreement, which gives each and every of the partners full power and authority to make contracts in the name and on behalf of all, and to bind all where the contracts are made for the purpose of promoting the end and design of the partnership. After such a contract is made by one partner, all are bound by it, and become liable for the fulfilment of it in whole, not each for his proportion, but each for the performance of the whole *contract, and may be [253] compelled by suit to make redress to the party aggrieved in case of a breach; in which suit, although all must be joined, after a judgment is had against them, the amount of the debt or damages recovered, may be levied out of the property of any one or more of them. In this agreement there is certainly no express authority given to one or other of them to make contracts for the purpose of having the work and object therein mentioned, accomplished, and to bind both of them for the payment of it when done. The race, which ranged along the allotment of each, was considered after the division as being throughout of common advantage to both, and the object of the covenant seems to have been a provision for putting and keeping it and the head gates in a certain state of repair, and in case one of them should neglect to do or to have done one-half of all that was necessary to effect this, to put it in the power of the other to do or cause it to be done, and to charge the one neglecting with one-half the expense, but certainly in no event to subject and make him liable to pay the whole of it, which would in effect be the case, if the charge of the court below to the jury was right on this point. Neither can I conceive, that any such authority is implied by this agreement, because to effect the design and object of the parties, it was in no wise necessary; and since neither the terms of the covenant, nor yet the nature of the thing to be done, require such authority to be exercised, there can be no colour for saying, that it existed. If this covenant then gave no authority to Wood to bind M'Cready to pay whomsoever Wood might choose to engage to perform the work or part of it, say upon that portion too of the property which became his by the partition, as was the case in this instance, it is clear that neither the covenant alone, nor yet the covenant and the fact of the work having been done by the plaintiff below at the request of Wood, could be considered

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any evidence whatever to the jury of the joint liability of Wood and M'Cready to pay Freedly for his labour and materials done and furnished in walling the race, &c. There was error therefore in this part of the charge.

The court, also, in their charge, told the jury, that Wood's asking for a copy of the bill of the admeasurement of the work done by the plaintiff below, and saying that he wanted it for M'Cready; that he was equally interested with himself, might be taken by them as some evidence of a joint contract. In this, I think, the court was wrong. The declarations or admissions of Wood, without any authority either express or implied, being shown to have been given by M'Cready to Wood, to bind him, or to make a contract binding them jointly, were no evidence whatever of a joint contract, and were not admissible for the purpose of charging M'Cready, either singly or jointly. Beside, from the nature of the arrangement between Wood and M'Cready, and their accountability to each other, growing out of their covenant, it was requisite that each should keep [*254] and preserve an account of *what he did or procured to be done, otherwise he might have to bear more than his due proportion of the whole burden.

The court also directed the jury, that they might consider the circumstances of M'Cready's having been frequently at the place, and his having his agents there during the whole time the work was going on, and his saying nothing to Freedly to induce him to believe that he was to look to Wood alone for his pay, as some evidence of M'Cready's liability. It appears to me, that the court below also erred in this matter; for unless the evidence in regard to this, had gone to show that M'Cready and his agents were there for the very purpose of superintending and directing the work that the plaintiff below was engaged in doing, no inference of M'Cready's connection with Freedly, or liability to pay him for the work, could be reasonably drawn; and why should M'Cready have told Freedly not to look to him for his pay, when it did not appear that he had reason to believe that Freedly intended to do so. Indeed, it did not appear that Freedly had any such idea of it himself, until afterwards, when he found that Wood, who contracted with him, was unable to pay; for, in making the contract, M'Cready was not named as a party to it, nor was it said that he was to pay anything. To produce a like bearing, the court also referred to the contract of 1825, which was one that had been reduced to writing, and signed by Wood and M'Cready, each, as one party, and by Freedly, as the second party to it. This, it is conceived, could and ought not to have had any weight whatever in determining the liability of M'Cready. It did not relate to the same labour

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for which the suit was brought, and if it showed anything, it was, that when M'Cready intended to make himself liable, he became a party to, and signed the contract, binding himself expressly to pay, in conjunction with Wood, for it. So that it might as well have been inferred from this, that when they intended to be jointly bound, they both joined expressly in making the contract.

The last error complained of, is, that part of the charge in which the court below, in observing upon the effect of evidence given on the part of the defendants below, going to prove that M'Cready had, at his own expense, walled the race opposite to his land, and from which, as M'Cready's counsel had contended, the jury might fairly infer, that Wood was not only left, but bound to do, at his own expense, what he had employed the plaintiff below to perform, told the jury, that as the same witness by whom M'Cready made this proof, upon his cross-examination, said that in another action brought by the plaintiff below against M'Cready, to recover a claim which Freedly had against M'Cready, for work done, in building a factory for him; that M'Cready, on a trial of it before arbitrators, charged Freedly with this work, which he, M'Cready, had done at his own cost, in walling the race, &c., opposite to his own lot, and claimed a set-off for it, and that, if this set-off was allowed to M'Cready, no inference could be drawn in his favour from the evidence of that witness, and *if the claim was set [*255] up as a set-off by M'Cready, and although the award which was made in the case was appealed from, and thereby set aside, yet as the controversy was afterwards settled by the parties, without any evidence being given of the terms, whether such claim by M'Cready against Freedly was allowed or not, that the jury might still presume that it was allowed or settled. I must confess that I do not see how M'Cready's claiming and being allowed by Freedly for this work, which M'Cready proved that he had done, in widening and walling the race, &c., at his own expense, rebutted the effect of the evidence which the court seemed to think it otherwise ought to have produced; because, if, as was alleged and contended for by M'Cready, that he previously paid Freedly for doing all this work under the contract which he made for doing it with Wood and M'Cready jointly in 1825, and Freedly had failed to do it, and therefore M'Cready had to do it himself, it was right that Freedly should reimburse M'Cready, and this circumstance could not detract in the least from the effect that M'Cready's having done this work and paid for it out of his own funds, otherwise ought to have had in going to show that he and Wood had been each separately employing persons to widen and wall up the race opposite to their respec-

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tive lots of the property which was once held by them as tenants in common.

The judgment of the court below is reversed, and a *venire de novo* awarded.

Cited by Counsel, 4 S. 24; 8 S. 468.

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*[PHILADELPHIA, JANUARY 23, 1832.]

Howell and Others *against* M'Coy.

APPEAL.

The plaintiff has a right to support his cause of action by proof of the facts stated in the declaration, whether they are sufficient in law to entitle him to recover or not; and this can only be prevented by a demurrer which admits the truth of the facts as set forth. If there be a defence, the defendant must avail himself of it, when the whole case is before the court and jury, by a direction on the law arising from the facts.

This court, however, will not, on a motion for a new trial, reverse the judgment of the Circuit Court, for the rejection of testimony, which if admitted, would not give the plaintiff a cause of action.

The erection of anything in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable.

The erection of a tanyard comes within the operation of this principle, provided it has the effect of corrupting and rendering unwholesome the water in the stream below, so as to be injurious to the other proprietors.

The limitation of these principles, is, either where there has been an appropriation for a period of twenty years, which, in law, raises a presumption of right, or it arises from contract.

One, who by a lease has a right to so much of the water of a stream, as shall be needful and proper for the supply of a tanyard, and the working of a bark-mill, and is bound to return all the water which he diverts for such purposes, over and above the quantity which should be necessarily used and consumed in conducting the business, without unnecessary and unavoidable loss, diminution or waste, into the creek above a dam situated lower down the stream, has no right to return it polluted by admixture with substances of a poisonous or unwholesome nature, to the injury of the lessor, or those claiming under him.

Although what is necessary to the enjoyment of the thing demised, passes with it as an appurtenant, without express words, yet what is merely convenient does not.

Therefore, a lease of a piece of ground for a tanyard and bark-mill, with the use of so much of the water of a stream as may be necessary for conducting the business, does not carry with it a right to the lessee, to empty the contents of his tanyard into the stream, or dispose of his surplus tan on the adjoining land of the lessor.

ON an appeal from the judgment of the Circuit Court of Northampton county, held by Huston, J., in April, 1831, it appeared, that this was an action on the case for a nuisance, in which the plaintiffs, George G. Howell, Peter S. Mechler, and Joseph Howell, complained, that they were possessed of a certain messuage, tenement, dwelling-house, grain distillery, water grist,

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and merchant mill, and saw-mill, and tract of land appurtenant, &c., with the benefit and advantage of a stream called Martin's creek, which runs and flows from a dam therein, along a certain head race, to the dwelling-house, distillery, merchant, grist and saw-mill, and for supplying the dwelling-house with water for culinary and domestic purposes, and the distillery and mills with water for use therein and the working thereof: That the defendant intending to injure, &c., threw into the dam or pool, &c., divers quantities of tan, bark, and ross, and discharged therein the contents of divers lime vats, bates, and greasy, glutinous, gelatinous, and other *offensive, poisonous, and unwholesome matter, whereby the head race was greatly filled, [*257] choked and obstructed, and the quantity of water passing to the mill greatly decreased and lessened, and the quality altogether injured and destroyed, for distillation and for culinary and domestic purposes. They also declare, that by throwing in the same, &c., it was carried into the head race, whereby the race was obstructed and choked, and the necessary quantity of water could not pass to the mill and distillery of the plaintiffs: That they were thereby put to great trouble and expense in clearing out their head race, and in procuring a sufficient and necessary supply of pure and wholesome water, for distillation and for domestic and culinary purposes.

The defendant pleaded, not guilty, &c.

The premises mentioned in the declaration, formed the greater part of a large tract of land, the whole of which had formerly been the property of William M'Call, who on the 8th December, 1821, executed a lease to Anthony M'Coy, the defendant, for fifty years from the 2d February, 1814, for another part of the said large tract, which will be particularly described hereafter. This lease recited an agreement between William M'Call and Anthony M'Coy, by which it had been agreed, that M'Call should demise to M'Coy a lot of ground in Lower Mount Bethel township, for the term of fifty years from that day, on the conditions hereafter stated: That M'Coy was to have the right and privilege of erecting and maintaining on the said lot, during the said term, a tanyard, and all the necessary buildings for carrying on the same, and the business of grinding bark, as well for sale or exportation, as for the use of the said yard, and of using the water of Martin's creek for the purposes aforesaid (under the restrictions and limitations, and according to the provisions in the lease specially set forth and contained), in pursuance of which agreement, the said Anthony M'Coy had entered into possession of the said lot, and had set up a bark-mill thereon, and had sunk vats, and formed and established a tanyard on the same, and had conducted the water from Martin's creek above

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the said lot, through the said lot, to the bark-mill and tanyard, for the use and purposes thereof: Therefore the said William M'Call did demise the said lot (describing it as containing two acres and twenty-six perches), together with the full and free use, right, liberty, and privilege, to form, construct, establish, and maintain a tanyard thereon, and sink vats, and make, set up, and erect on the same lot, a bark-house, currying-shop, and all other necessary, convenient, and proper buildings, for carrying on and conducting the same trade and business of a tanner and currier, and of erecting and maintaining on the same lot, a bark-mill, with all proper and convenient machinery for grinding with one stone, bark, as well for the use of the said yard as for sale or exportation, and of taking and conducting from and out of Martin's creek, on the land of the said William M'Call, adjacent to and above the demised lot, so much of the water of the creek, as shall be needful and proper for the supply of the tanyard, and [*258] for working a pump therein, and for grinding *bark at the said mill, with one stone and no more, and for no other use and purpose whatsoever; and to that end to erect and maintain a dam in and across the creek of the height necessary for the purposes aforesaid, and no higher, at the place where the said Anthony M'Coy had already constructed a dam, above the demised lot, and to lead and conduct the water of the creek out of the same, at and above the said dam, through the adjacent land of the said William M'Call, to, upon, and through the demised lot, to the mill and yard aforesaid, through, in, and along the race or water course already made and constructed for that purpose by the said Anthony M'Coy, by virtue of the before-recited agreement, in quantity sufficient for the uses and purposes aforesaid, and in no larger or greater quantity, and in no other or different course or direction, and for no other use or purpose whatsoever, provided always that the water of the said creek be not raised by the dam so high as to swell or flow back beyond the line of the said William M'Call, upon the land above the same and adjacent thereto: and provided also, that the water which shall be conducted to the mill and yard over and above the quantity which shall be necessarily used and consumed in conducting the business and which shall flow and pass from the mill, shall from thence be conducted, without unnecessary or unavoidable loss, diminution or waste, and returned into the said creek by a sufficient tail race, at and above the present mill dam of the said William M'Call; to which end the said Anthony M'Coy, his executors, administrators, and assigns, shall raise and maintain a dam or mound along the lower side of the said tail race, to prevent the waste and escape of the said surplus water, before it shall reach the creek at the mill dam of the said

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William M'Call, together with free liberty of ingress, egress, and regress into, upon, and over the adjacent lands of the said William M'Call above and below the demised lot, for the purpose of repairing and maintaining the dam or mound and the races or water courses, at all necessary and convenient times, with workmen, carriages, horses, &c., as far as shall be necessary for mending, upholding, repairing, and maintaining, the said dams or mounds, and for cleansing, scouring, repairing, and maintaining the said races or water courses, and no further, and at no other times, and for no other purpose or purposes.

A long time prior to the execution of this lease, and the agreement recited in it, there had been erected on the large tract belonging to M'Call, below the tanyard, a merchant and grist mill, a saw-mill, and distillery, for all which he used the water of Martin's creek, and the water of the creek taken from the head race of the merchant and grist-mill was also used for domestic purposes in the dwelling-house of M'Call, and by his workmen and their families, who lived contiguous to the head race.

On the 2d June, 1825, William M'Call conveyed this tract of land, with the mills, distillery, and appurtenances, to the President, Directors, and Company of the Bank of Pennsylvania, to whom he, at the same time, assigned the above-mentioned lease to M'Coy.

*The Bank of Pennsylvania, on the 22d September, 1826, conveyed the said tract of land, mills, &c., and [*259] assigned the said lease, to Eseek Howell.

On the 10th of October, 1827, Eseek Howell leased the said tract of land, merchant, and grist-mill, saw-mill, distillery, mansion-house, out-houses, barn, sheds, stables, dwelling-houses for workmen, &c., conveyed to him by the Bank of Pennsylvania, together with the privileges and appurtenances thereunto belonging, to George G. Howell, Peter S. Mechler, and Joseph Howell, the plaintiffs, for four years and three months from the 1st of January, then next ensuing. These were the premises mentioned in the declaration.

After the plaintiffs had examined several witnesses to prove the facts set forth in the declaration, his Honour observed, that the lease from Eseek Howell to the plaintiffs mentioned a lease from William M'Call, the former owner of the whole tract, to Anthony M'Coy, the defendant, for the tanyard property, and asked for its production. It was accordingly produced and read. The counsel for the plaintiffs, having proposed to ask a witness, whether the water was not corrupted and rendered unwholesome by the acts complained of, the counsel of the defendant, objected to the question being answered, but the judge sustained the objection, observing, that "the man, who rents a piece of ground

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for a tanyard, cannot claim damages from the person to whom he has rented it for that purpose, for discharging the contents of his yard, &c. He who claims or rents a property, subject to an easement, must take it subject to the easement, as it was used when he took it." At the request of the plaintiffs' counsel, his honour noted an exception to this opinion. The plaintiffs' counsel then offered to prove the number of families on the plaintiffs' premises, who depended on this water for domestic purposes; that it was corrupted so that it could not be used, and that it was injured for the purposes of distillation. This evidence being objected to, was also overruled by his honour, who noted the point.

The defendant asserted a right to throw tan or ross, and to empty the contents of his vats into the stream, in the manner stated in the plaintiffs' declaration, by virtue of his lease from William M'Call, of December 8th, 1821, for fifty years from February 2d, 1814, which he alleged was made with express reference to the manner, in which he had been accustomed to use the water, under the parol contract referred to in the lease.

After the lease had been read in evidence, he offered to prove, that he always threw tan into the stream. The evidence was objected to by the plaintiffs' counsel, but admitted by the court.

Richard Merrill was then examined on the part of the defendant, who testified, that he had known this property twenty or twenty-one years; that he went there twenty-one years ago, and lived there ten years; that the race ran pretty rapidly along till it came to the tumble of the saw-mill; that, at the first gate, the gravel would be beaten down by the gully, and make a kind [*260] of a stop and an eddy below; *the leaves, dirt, and trash would settle there when there was no tanyard, and they had to clean the place very often; they had a general frolic cleaning the race, three or four times whilst he was there; that they went at other times and cleaned other little places; that the gully above comes off Mench's land, and comes down some fields; the fields are ploughed occasionally; that the saw-mill dam did not fill up a great deal, though it did partially; that there are two gullies, which come into the saw-mill dam from a flat field above, which was sometimes ploughed, and he had seen it half leg deep there with dirty water; that very little tan came down whilst he was there; there was none in the dam to hurt it; he saw very little in the creek, and in the race; it would settle along the creek going down; he had seen M'Call frequently along and around there. On his cross-examination, the witness said, that no tan came down in the race to the saw-mill dam; he saw it in the creek as low as the saw-mill, but not

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in the race; the upper dam was somewhat lower on the side next to the tanyard, which made some difference; in Yohe's time, that dam was all swept out; they had since repaired it, and the witness did not know the situation of it since.

Samuel Eaken, another witness examined for the defendant, stated, that he had known this property before M'Coy came to it; that he had seen tan thrown into M'Coy's tail race; that the first tan he hauled out, he wheeled before the tanyard, and he continued to do so, till he got to the end of the race, and then he threw it on the edge of the bank, where some laid and some fell in; that he helped to sink the first vats that were sunk there; they were sunk in the handling-house, and logs were laid under; that the tan did not come down the creek immediately, but shortly after they saw tan in the creek below the dam; that he could not say, whether Mr. M'Call lived there then or not; if he did not live there, it was shortly after he went away. Being cross-examined he said that he had seen Mr. M'Coy employ hands to throw in tan when the water was high, running over the dam; that he had never seen them throw it in, except when the water was running over the dam; they were throwing in what had been previously wheeled to the edge of the race; that he did not recollect seeing any tan going down the head race; that Mr. M'Call once cleaned the race; it got very full below the tumble, and he made a frolic, and the witness was one of the hands; that they threw out a considerable quantity of mud and leaves, and he supposed there was gravel, but there was no tan; this was before M'Coy's time.

Morris Morris, who was also sworn for the defendant, testified, that he went to this property, to the saw-mill in 1820; he saw tan; some came down the race, and a quantity was in the creek, and continued the whole length of time he stayed there; he helped to clean the race in 1822 or 1823; in places there was a great deal of gravel; just below the tumble it was nearly all gravel; the ice generally formed about the old forebay between that and the tumble; the earth settled *most, from the tumble about two hundred yards down; [*261] the race appeared lower at that place than lower down; sometimes, after a shower, if the field above was ploughed, the race filled up about the old forebay; where the gully comes down, a great body of water descends from that field after a heavy rain; the witness lived there six years, and left the place when Yohe went away; the mill remained idle the summer after Yohe left it, and Mr. Howell got it that summer: the witness did not know that the dam had filled up much more than it did; it filled up more or less every year, some years more than others; that depended upon whether or not the field was ploughed, in

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which the saw-mill dam was ; he thought Mr. M'Call moved to New Orleans in the fall of 1820 ; he sold out to M'Coy, and he to N. Brittain ; the witness continued to work for them until Yohe came there ; after M'Coy began, he saw tan carried out in front of the tan-house ; he thought the dam appeared higher than when he lived there ; it appeared to be raised clear across, &c. There used to be a low place next the yard, where the water ran over before it did at any other place : there is a three-inch plank on the top of the logs clear across, and on that low place there is a piece of timber fixed six or eight inches thick ; the top log was on these pieces ; there was one log torn off the dam whilst he was there, and he assisted in putting it back ; this happened, he thought, in the third year he lived there ; he did not discover that the dam had sunk.

George M'Ewing, another witness for the defendant, swore, that he came to M'Coy on the 26th of February, 1821, and worked with him till the 6th of April, 1830 ; the greatest business done in the yard was from 1825 to 1828 ; that when Mr. Howell got the property, he scolded about their throwing tan into the race, and M'Coy said they had better quit it, as it might lead to a disturbance or quarrel ; that they threw it on the bank, and in high water, into the race ; that before Howell came there, they threw all the tan into the race ; they made use of the race for that purpose ; that after that time, they only threw it in at high water ; at low water, they put it on the bank, according to his orders ; that they would get two or three hands in the spring, and throw it into the creek when the water was high ; that there might be a place for a time to put the tan upon, but it would not do many years, unless it was piled pretty high ; it might be deposited there for one year ; that M'Coy and Howell had some scolding, and M'Coy told the witness when he went away, not to throw a shovelful into the race ; that he was away, and they were letting off some limes, and Howell found fault with it, when the witness asked him if he would not let him shut down the gates ; he asked the witness how long it would keep, and he answered from ten to fifteen minutes ; Howell then turned round and told his men to take particular notice whether they could perceive the loss of the water, whilst the gates were down ; that the witness saw one of the men, and asked him, and he said he could not perceive the loss of the water ; *that they shut the gates down when

[*262] Yohe lived there, when they drew off limes ; that when he first knew the dam, it was higher from five, to six or seven feet from the bank ; then it sunk down, and the further over it bent, the higher it rose towards the other side of the creek in Yohe's time ; that Howell put a three-inch piece on the log,

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and after the firm came, they put on another piece at this low place; that the piece of timber and the round piece, raised it about ten inches; that when they let off water or tan, it would run over there, and would not dam so much; after they were put on, the filth was carried down more than it was before; that the dam, after he came there, was lowest on the side next to the tanyard; that after M'Coy told him, they shut the gates and let off the tan when the water was low, but when the water was high, they threw it in without shutting the gates; that he remembered seeing George G. Howell and Metzger at the forebay when they had just done casting in the tan lech; that the witness wheeled away the most of it, and was scraping up what remained; that they threw it out with shovels, and wheeled it along the race; it did not all go in; he thought he was not throwing into the race, when they were there, what was wheeled to the bank; that in Yohe's time, they threw it into the race, or on the yard, whichever was the handiest, both at high and low water; that in letting off limes or bates, Howell scolded so much, that they shut down the gates, but whether or not they did for the bark, he could not say; that they were in the habit of wheeling the tan along the race, and throwing it in, in the spring of the year, but they did not do this so much till after Mr. Howell scolded; when the water is seven inches over the strip that Howell put on, it throws the water eight inches on M'Coy's sheeting; he never measured before the piece was put on; it rose in M'Coy's limes and bates, from four to five inches; they would not run off dry, as they had done before.

Owen Rice was also examined on behalf of the defendant, and stated, that he was along the race in the fall of 1829, when both parties were present; that they went up the race, and viewed the different places; that there was a good deal of stuff thrown out, lying on the bank, and there was stuff taken out with a stick to show them; the sediment in the race was tan, gravel, and leaves; what was thrown out was sand, tan, gravel, and leaves; that they found a good deal about the tumble, and there appeared a considerable quantity of leaves in the race; that from the situation of the race, a good deal of gravel, &c., must be carried in by the rains; that part of the ground is flat, and a very large part hilly; that there were two gullies, at one of which there appeared to be a considerable deposit; that in a race situated as this, large quantities of stuff must be collected; it could not be otherwise; M'Coy said the forebay had been lowered; the dam had been raised; the witness thought the dam was highest next to M'Coy's; no water was running over when they were there; the tail race empties about a perch above the dam.

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Isaac Wikoff, who was also produced by the defendant, swore [*263] that *he was present on the occasion spoken of by the last witness; that their attention was more directed to what was in, than what was thrown out; there was tan, and mud, and leaves thrown out; he could not say in what proportions, but it did not strike him there was a great quantity; in some places there was more than in others, particularly at the tumble; the part of the dam next the tanyard, appeared to have been lower, and there was a piece put on, whether it was higher or lower, he could not say; M'Coy alleged the dam had been raised, and the witness thought that Howell said it had not.

Daniel Keim, a witness examined on behalf of the defendant, stated, that from next to Howell's race, they raised it till a little the other side of the middle of the creek, between three and four inches; from there about twelve feet, they did not raise it more than an inch; from there, for six or eight feet, they raised it between three and four inches; that brought them to the bank on M'Coy's side; Howell planked on the lower side, where it was washed out; this was done to nail the sheeting to; the dam was low in the middle; there was a deep hole below the dam all the way over; it was washed out most from Howell's side, towards the middle; one of the logs in the middle where the low place was, was pretty rotten, and they had to pin it in the knots; he thought M'Coy was there once while they were doing this.

Charles Stroud, being sworn for the defendant, said, he knew the lines; there appeared very little space to throw the tan in the yard; he supposed they would fill it in six months or a year; there were from sixty to seventy vats in the yard, from four feet six inches, to five feet deep, &c.; M'Coy used from four hundred to five hundred cords of bark a year; in warm weather the latches were emptied every day.

William Bitters, another witness for the defendant, swore that he did not know when the dam was raised; it was higher than it used to be; below the dam, the tan settles in a low time, but the least current sweeps it out; a fresh clears it out; he lived by the saw-mill in M'Call's time; the dam was full of mud then, and is full of mud yet; he used to cross the dam; then the sticks that went up the dam could be seen; now it is filled up, and they cannot be seen; the piece that has been put to it, can be seen; he did not know whether the old dam had settled or not.

After the defendant had closed his testimony, the plaintiffs examined Peter Dietz, who testified, that he was miller there in M'Call's time; that he knew of no tan being thrown in, in M'Call's time; that none came down the race, and there was no complaint; that from the tumble, for two hundred yards down, the tan was the greatest proportion; that he had known

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the dam since 1804; that when constructed, it appeared to be a level dam; that he could not say it was or was not higher than when M'Coy came there; he did not think it was any higher.

*Christian Metzger, who was also called by the plaintiffs, swore, that they did not lower the forebay when it [*264] was put in new.

His honour charged against the plaintiffs' right to recover, and the jury found a verdict for the defendant.

A motion, made on behalf of the plaintiffs for a new trial having been overruled, they entered an appeal to this court, for which the following reasons were filed :

1. That the court erred in rejecting evidence in support of so much of the declaration as charged the defendant with corrupting the water flowing into the plaintiffs' premises, by casting the spent liquors, lime vats, bates, and other injurious and noxious substances therein.

2. That the court erred, in charging the jury, that under the lease from William M'Call, the defendant had a right to discharge his tan and vats into the tail race of his bark-mill, and that the lease bound him to return all the ooze, spent liquors, and the contents of his vats into the creek above the plaintiffs' dam.

3. Also in charging: That the plaintiffs, being but lessees under a subsequent lease, had no right of action against the defendant, who was also a lessee, but under an older and longer lease, if the defendant had been accustomed to discharge his tan, and the contents of his vats into the tail race emptying into the plaintiffs' dam at the time their lease commenced.

4. That the court erred in telling the jury, that from the evidence there was great doubt whether there was any injury done to the plaintiffs' mill and distillery by the tan discharged into the dam and race.

5. That under the evidence in the cause, the court should have charged the jury that the plaintiffs were entitled to recover.

Brooke and J. M. Porter for the appellants.—The plaintiffs have been interrupted in the enjoyment of their mills, annoyed and injured in the use of their distillery, and deprived of many of their most necessary domestic comforts by the acts of the defendant: and having been unable to obtain redress in any other way, they have brought this suit to recover damages for the injuries of which they complain. The defendant has merely pleaded not guilty. He has not pleaded a license, which, if it existed, it was incumbent on him to plead and prove.

To poison a water-course, gives a right of action to the party injured. Such was the law in the time of Lord Coke, and such

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it has continued to be ever since. Angell on Water Courses, 59 ; 4 Mason's Rep. 400 ; 2 New Hamp. Rep. 532, 537. If then the plaintiffs have sustained an injury by the corruption of the waters of the creek, to the use of which they are entitled, they must recover damages from the defendant, unless a license has been proved. The facts established by the evidence of the plaintiffs showed such acts to have been committed by the defendant, as must have poisoned the water of the creek, and they had a right [*265] to ask the witness who was under examination, *whether the water had not been corrupted and rendered unwholesome. But the judge anticipated the defence, by calling for the lease, upon which he supposed the defendant would rest, giving his own construction to it and rejecting the evidence. He interrupted the plaintiffs in their regular course, and forestalled the merits of the case, by requiring the production of a paper, which had not, and in that stage of the cause could not have been offered in evidence, and acting upon it as if it were regularly before the court and jury. This was clearly wrong.

In his construction of the lease under which the defendant attempted to justify, the judge was also wrong. His construction of the instrument was, not only that the defendant had a right to discharge the contents of his tanyard into the tail race of his bark-mill, but that he was bound to return all the ooze, spent liquor, &c., into the creek above the plaintiff's dam. For this idea, which supposes the lessor to be destitute of common sense, and totally incapable of understanding his most obvious interests, there is no warrant in the lease. Its terms require the defendant to return all the water taken out of the stream for the use of his mill and tanyard, beyond the quantity which shall be necessarily required in conducting his business, with as little diminution as possible, into the creek above the plaintiffs' mills. Now, it is clear, that after the water had been corrupted and poisoned by admixture with hair, lime, and other foreign and contaminating matters, it no longer possessed the character of water, but became a different substance, highly deleterious and wholly unfit for any useful purpose, which the parties never could have intended, should be given to M'Call instead of the element by means of which he could make an advantageous use of his property, and which was essential to the comfort of his family, and those of his workmen employed about his establishment. To suppose, that M'Call intended, for the paltry consideration of the rent reserved by the lease, not only to destroy one of the most extensive establishments in the country, but to deprive himself of his supply of water for domestic purposes, is to ascribe to him absolute insanity. The lease evidently had regard as well to the quality as the quantity of water to be

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returned for the use of M'Call. This is apparent not only from the plain common sense construction of the language used in reference to this subject, but from other parts of the instrument. The defendant was to erect mounds for the purpose of preserving the surplus water, not the contents of the vats; what they contained was not surplus water. It is called bates, spent liquor, ooze, &c., and does not in any respect retain the character of water; it is totally changed. To suppose that the parties intended to secure to M'Call this impure liquid, totally unfit for the purposes of his business establishment; and still more so, if possible, for those of his domestic establishment, is absurd. It is no argument in favour of the defendant's construction to say, that he had hemmed himself in so closely, that he had no room to dispose of the refuse of his establishment, and *therefore was compelled to throw it into the [*266] water. This is his own concern. He should have foreseen how much land would be required for his business, and taken care to secure it by the lease. Besides, it was not necessary, that he should dispose of the contents of his tanyard in the manner in which he did, however convenient it may have been; and although what is necessary to the enjoyment of a grant, passes with it without express words, yet what is merely convenient, does not.

The plaintiffs, though they were in under a lease subsequent to that of the defendant, had a right to maintain this action, even if the defendant had been in the habit of doing the acts complained of, when the plaintiff's lease commenced. The defendant's lease gives him no such right, and if he does not derive it from that source, he can support it on no other ground than an uninterrupted user of twenty years, 2 Big. 5 Pl. 5; 7 Pick. 198; Angell, 44, 45, 46, 60; 15 Johns. Rep. 213; 4 Mason's Rep. 397. A usage for a short period prior to the execution of the defendant's lease and afterwards, amounts to nothing. Even an article of agreement is absorbed in a subsequent deed, which is considered as expressing the ultimate intent of the parties. *Crotzer v. Russell*, 9 Serg. & Rawle, 78. A *multo fortiori* a parol agreement, proved merely by a practice supposed to have existed under it, is lost in a written lease making provision for a different state of things. That the defendant has used the privilege he now contends for, uninterruptedly for twenty years, will hardly be pretended. The evidence entirely negatives such an idea. It shows that prior to 1821, the right was not even asserted by M'Coy, for when the nuisance was discovered, and M'Call was informed of it, the defendant promised to help him to remove it. Again, when Howell complained of it, he did not assert a right, but ordered his hands not to repeat it. No tan was thrown in until 1822, when M'Call was in New Orleans,

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and even then it was not done under an assertion of right. In fact, the evidence shows, that no adverse right was ever asserted, which is necessary to give title by possession. Such was the state of things when the plaintiffs took their lease, and the defendant can have no other rights now than he had then.

There is no ground for a suggestion that the plaintiffs were the authors of the evils of which they complain. They never raised their dam. It had sunk by the operation of time, and they did not raise it even to its former height. They merely put a piece on the lower side of the dam, and the water still runs over on the side next the tanyard. M'Coy did not consider himself injured or interrupted in the enjoyment of his rights by this, for he continued to pay rent regularly without complaint.

(Judge Huston denied the facts stated in the fourth reason for a new trial.)

Hepburn and Jones for the appellee.—The lease to the defendant of 8th December, 1821, was nothing more than a reduction into form of a previous agreement. If this was done [*267] before the plaintiffs came into possession, the defendant still retains all the rights he had before the execution of their lease. The lease recites the former agreement of February 2d, 1814, which was expressly for the purpose of erecting a tanyard. The mode of enjoyment prior to and at the execution of the formal lease, was in the contemplation of the parties at the time, and it was necessary to resort to parol testimony to ascertain what were the privileges then enjoyed, the object being to confirm those privileges. The inconveniences of such an establishment as the defendant's, to those who used the same stream, were fully known to both parties, and if a nuisance then existed, it was incumbent on M'Call to reform it. He did not however think proper to do so, but accepted the rent as a remuneration for the inconveniences he was to sustain. Water was necessary both for the use of the mill and for other purposes connected with the defendant's business, and the lease provides that it shall be used not only for the mill, but the yard also. It provides, too, that the water not used in conducting the business shall be returned into the stream. This provision relates to the quantity of water to be returned, and does not require the defendant to purify it before it reaches the plaintiffs. He is bound to return the surplus water, such as it is, after it has been used in conducting his business. If it has become contaminated in the process, it is the unavoidable consequence of the object, to which, by the agreement of both parties it was to be applied, and neither has a right to complain. It is a refinement to say, that the liquid discharged from the vats is not

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water. It is water, though impure, and just as valuable to drive a mill, as if it had never been contaminated. If, instead of returning the surplus water in the state in which it was, it had been withheld, the defendant would have been liable to an action for damages under the covenants in the lease. Had the defendant a right too, to throw his surplus tan into the stream? As the premises were let for a tanyard, he had a right to dispose of the tan in some way as an incident to the principal grant. If it was disposed of in the manner the least detrimental to the plaintiffs, they can maintain no action. The former agreement was the consideration of the lease of December 8th, 1821, and all the privileges previously enjoyed, it was the object of that instrument to secure. From the first establishment of the tanyard in 1814, the defendant had been in the habit of throwing tan into the tail race. This was absolutely necessary, for if he could not dispose of it in that way, he would have been obliged to relinquish his business, as there was no other mode of disposing of it. The quantity was too great to be hauled away, and if it had not been, he could not have carried it over the adjoining lands which did not belong to him. M'Call, who owned the property both above and below, knew that it must be disposed of in the manner in which it was, and with that knowledge granted the lease. It was therefore a privilege springing out of the grant, to the enjoyment of which it was necessary. He exercised the privilege before the execution of the lease, and continued to do *so afterwards while M'Call [*268] remained on the premises, and no complaint was made. This practice furnishes a guide to the construction of the lease. Angell, Appx. 17; 3 Starkie on Evid. 989; 1 Saund. 322; Strickler v. Todd, 10 Serg. & Rawle, 69.

If the plaintiffs have sustained any injury, it has been by their own procurement. They raised their dam, which they ought not to have done. There was an opening or low place in it, until the plaintiffs came into possession, which was left for the purpose of drawing off this offensive matter. By this unauthorized act, the plaintiffs not only created the nuisance to themselves of which they now complain, but by swelling back the water on the defendant's bark-mill, they gave him a right of action against them for a nuisance. A tenant has no right to alter the property even by improving it. 3 Saund. 259, note 11.

The opinion of the court was delivered by

ROGERS, J.—Who, after having stated the substance of the declaration and the plea, proceeded as follows:

The plaintiffs having examined several witnesses in support

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of the issue, offered to ask a witness whether the water was corrupted and unwholesome; to prove the number of families who depended on this water for domestic purposes; that it was corrupted, so that it could not be used, and that the water was injured for purposes of distillation. The testimony was overruled by the court, and this forms the plaintiffs' first exception, and in this is involved the whole question in the cause. The testimony was overruled, as I conceive, in direct opposition to the case of *Crotzer v. Russell*, 9 Serg. & Rawle, 82, and *Moore v. Houston*, 3 Serg. & Rawle, 175. The plaintiff has a right to support his cause of action, by proof of the facts stated in the declaration, and this can only be prevented by a demurrer, which admits the truth of facts, as set forth. The defence, if any he had, whether arising upon license or otherwise, will properly avail the defendant, when the whole case is before the court and jury, by a direction on the law, arising on the facts. In *Moore v. Houston*, 3 Serg. & Rawle, 175, Chief Justice Tilghman says, "If the question were simply whether the judgment of the Court of Common Pleas should be reversed or affirmed, there would be but little difficulty in deciding it. If any of the rejected testimony was competent, the judgment cannot stand. And without doubt, part of it was competent, because it was in direct proof of the defendant's plea, and therefore admissible, whether it was matter sufficient in law to bar the plaintiff's action or not. If the plaintiff thought it insufficient to bar him, he might have demurred; but having joined issue, he cannot prevent that from going to the jury, which tends to prove the issue, on the part of the defendant." As, however, this is a motion for a new trial, we would not reverse the judgment of the Circuit Court if the testimony, when admitted, would not give the plaintiff a cause of action, [*269] and this will render it necessary to consider the law, arising as well on the evidence which was rejected, as on that which was admitted by the court.

It is a principle of the common law, that the erection of any thing in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. And this principle not only stands with reason, but it is supported by unquestionable authority ancient and modern. It has long since been adjudged, that he, who has a fishery, may maintain an action against a person for erecting a dye-house. 9 Rep. 59; Co. Litt. 200, b; Angell on Water Courses, 59, Appendix, 17; *Bealey v. Shaw & al.* And if a glover set up a lime-pit, for calf and sheep skins, so near a water-course, that the lime-pit corrupts it, an action lies. Angell on Water Courses, 60, and the case there cited. 13 Hen. 2 b, 6. The maxim is, *sic*

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utere tuo ut ne lædas alienum. These positions are recognised by all the writers on the common law, nor have they ever been disputed or denied, in any adjudged case, so far as my researches have extended. The erection of a tanyard comes within the operation of the same principle, provided it has the effect of which the plaintiffs complain, corrupting and rendering unwholesome, the water in the stream below, used either for distillation, or for culinary or domestic purposes. The general rule of law is, that every man has a right to have the advantage of a flow of water, in his own land, without diminution or alteration in quantity or quality. Nor are we to be understood as saying, that there can be no diminution or alteration whatever, as that would be denying a valuable use of the water. The use of it must be such, as not to be injurious to the other proprietors. Each riparian owner has a right to a reasonable use of the stream, which, of course, will be judged with a regard to public convenience, and the general good. It has been said, that this doctrine may prove injurious to the manufacturing establishments which are rising so rapidly in this country. I do not think so, but if it does, that is no reason why private rights should be infringed, although it may be a strong reason for legislative interference, in providing a mode by which compensation may be allowed to those, whose rights may be affected by an establishment in which the public may be interested.

The limitation of these principles is, either where the appropriation has been for a period of twenty years, which the law deems a presumption of right, or it arises from contract.

I have examined the testimony, with a view to the first question, and there is certainly nothing in evidence which would justify the jury in presuming a grant, so that our attention must be directed to the contract, which the defendant alleges, authorizes him to throw in tan and ross, and to empty the contents of the vats, in the manner stated in the plaintiff's declaration.

William M'Call, under whom the plaintiff's claim, and who was *the proprietor of the property, made a lease of the premises, on the 6th of December, 1821, to Anthony [*270] M'Coy, on which he relies for his justification. From the lease, it would seem that the defendant enjoyed the premises under a parol contract, and the defendant says, the lease was made with a special reference to the manner in which he was accustomed to use the water, and discharge the contents of the tanyard. Had the defendant sustained this allegation by clear, unequivocal proof, it would have been entitled to great weight in the construction of the lease, as it would have been some evidence of the meaning attached to the contract by the parties themselves. But in this, the defendant has failed. Occasionally throwing in

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tan, which caused no essential injury, perhaps without the knowledge or observation of M'Call, could confer no right, nor is it entitled to much weight in the construction of the lease. The defendant contends for the right to return the water, mixed with whatever greasy, glutinous, unwholesome, or poisonous matter it may have acquired in undergoing the process of manufacture, and that the quantity, not the quality of the water, was in the contemplation of the parties to the contract. I cannot agree to this construction. It appears very improbable that the parties could have been so absurd, as not only to permit, but to bind M'Coy to return the water into the race, after it had been polluted by intermixture with other substances of a poisonous or unwholesome nature. M'Coy contracts for the use of so much of the water of Martin's creek, as should be needful and proper for the supply of the tanyard, and for working a pump therein, and for grinding bark at the mill, with one stone, and no more, and for no other use or purpose whatsoever. And to that end he is authorized to lead and conduct the water of the said creek, out of a dam erected for that purpose, through and along a water-course already constructed, &c., a quantity sufficient for the uses and purposes aforesaid, and in no larger or greater quantity, and in no other or different course or direction, and for no other use or purpose whatsoever: Provided, that all the water which shall be conducted, as aforesaid, to the mill and yard, over and above the quantity which shall be necessarily used and consumed in conducting the business, shall from thence be conducted, without unnecessary and unavoidable loss, diminution, or waste, and returned into the said creek, by a sufficient tail race, at and above the present mill-dam of the said M'Call.

The obvious intention was to prevent any unnecessary waste of water, and for this purpose, care is taken to return the surplus water to the creek from which it was taken, so as to supply the mill of M'Call, which was situated on the stream below. It is the water which is not used or consumed, which M'Coy stipulates shall be returned to the stream. This contract, like every other, must receive a reasonable construction, and there can be nothing more certain than that they intended what they have clearly expressed, to secure to M'Call the surplus water, not [*271] necessary in conducting the business *in which M'Coy was then engaged. This is a stipulation which frequently forms part of a contract of this nature, and it is inconceivable to me, that either party could intend, that water, mixed, partly consumed, and of a deleterious and poisonous nature, should be conducted, without unnecessary and unavoidable loss, diminution, or waste, and returned into the creek, which is the language used by the contracting parties in this case. The lease

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grants liberty to M'Coy to take and lead the water of the creek, or so much as shall be necessary for M'Coy's purposes, binding him to lead and discharge the surplus water by the tail race which had already been constructed.

The defendant further contends, that he is at liberty to make this disposition of the tan, and other matter of the tanyard, as a right appurtenant to the grant, and for this relies upon *Strickler v. Todd*, 10 Serg. & Rawle, 69, and 3 Saund. 259, and upon the well-established principle, that whatever is necessary to a grant, passes without express words, as an incident. But as I understand the rule, it must be necessary to the enjoyment of the thing devised, not merely convenient; and there is a great difference between what is necessary and what is convenient. It would, doubtless, be extremely convenient, if M'Coy possessed the right asserted by his counsel, of emptying the contents of his tanyard in the stream below, or disposing of his surplus tan on the land adjoining his yard, but that this is necessary, may well be doubted. There are various ways of disposing of the surplus matter of his tanyard, besides the one adopted, and it was for him to consider this, at the time of the lease. The presumption is, he knew the quantity of land which he would require for the successful prosecution of his business, and if he did not choose to purchase more, it is surely not the fault of M'Call, or those who claim under him.

The court are of opinion that the plaintiffs have a cause of action, and that a new trial should be awarded.

New trial awarded.

Cited by Counsel, 5 Wh. 594; 6 Wh. 310; 2 W. 467; 8 W. 302; 4 Barr, 484; 2 J. 249; 8 C. 405; 3 Wr. 262; 4 S. 44, 170, 420; 7 S. 109; 3 N. 284, s. c. 4 W. N. C. 258; 5 N. 402; 15 N. 213.

Cited by the Court, 4 W. 245; 4 S. 48; 6 W. N. C. 102.

In the case in 6 W. N. C., this subject is elaborately discussed both in the opinion of the court and in the dissenting opinion of Mr. Justice PAXSON. See also 13 N. 302, s. c. 8 W. N. C. 521, and 6 O. 370, s. c. 14 W. N. C. 81.

*[PHILADELPHIA, JANUARY 23, 1832.]

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Stevenson against Kimber.

The requisitions of the rule which declares, that in no case whatever shall special bail be entered, without twenty-four hours' notice in writing, specifying particularly the name, place of abode, and calling of the bail, must be strictly and literally complied with, and cannot, under any pretence whatever, be dispensed with.

J. R. Ingersoll, for the plaintiff, obtained a rule to show

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cause why the entry of special bail in this case should not be stricken off.

Kittera opposed the rule.

The opinion of the court was delivered by

ROGERS, J.—A rule of court directs, that in no case whatever, shall special bail be entered, without twenty-four hours' notice in writing, specifying particularly the name, place of abode, and calling of the bail. The rule was adopted to prevent surprise, and to avoid surreptitious entries of bail, and this object can be best effected by a strict and literal compliance with the rule. As the directions of the rule are by no means difficult, and are as explicit and plain, as words can make them, they will, under no pretence whatever, be dispensed with.

Entry of bail stricken off, and the recognisance of bail vacated.

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Righter and Another *against* Rittenhouse.

IN ERROR.

A *fiery facias* issued by the consent of the defendant after the expiration of a year and a day from the date of the judgment, and levied upon land owned by him when the judgment was entered, and upon which it continued to be a lien from its date until the levy, but which was conveyed by him within the year and a day, is regular, as against his alienee; there being no allegation or pretence by the party complaining, that any defence could have been made, if instead of an execution a *scire facias* had been issued.

Such assent need not appear on the record or even be in writing, and it may be proved by the evidence of the defendant himself.

As long as the defendant in a judgment is alive, a *scire facias quare executio non* may be served on him alone, without notice to terre tenants, where there are any. And in the event of the defendant's death, a *scire facias* is to be served on his executors or administrators.

If terre tenants, whose interests are at stake, know of any defence, the court, upon an application made by them in due time, will permit them to make it.

This court cannot, on a writ of error, judge of the regularity of an execution issued in the court below, where the question involves matters of fact, which do not appear on the record.

WRIT of error to the District Court for the city and county of *Philadelphia*. The defendant in error, Jacob Rittenhouse, was plaintiff below, and the plaintiffs in error, John Righter and Elizabeth Margaret Hellerman, defendants.

The facts of the case were these :—

John Righter, one of the plaintiffs in error, on the 30th

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March, 1820, gave a bond with warrant of attorney to confess judgment to Jacob Rittenhouse, the defendant in error. The bond was conditioned for the payment of three hundred dollars on the 30th March, 1821. Judgment was entered on the bond by Rittenhouse on the 10th April, 1820.

By deed bearing date, 20th July, 1820, Righter conveyed the land, in reference to which the present controversy arose, to Henry S. Wunder, with special warranty, for eight hundred dollars, a receipt for the payment of which was annexed to the deed.

On the 10th October, 1820, Henry S. Wunder conveyed the same land to Jacob Hellerman, since deceased, (the son of one of the plaintiffs in error,) by deed with special warranty, for eight hundred dollars, a receipt for the payment of which was annexed to the deed. This deed was recorded 27th March, 1822.

Rittenhouse issued a *feri facias* on his judgment, returnable to September Term, 1823, which the sheriff returned "*Tarde venit.*" An alias *feri facias* was then issued, returnable to the following December Term, *and under this writ the pre- [*274] mises in question were levied upon and condemned.

A writ of *venditioni exponas* issued to March Term, 1824, and the premises were advertised for sale, but were not sold. To September Term, 1826, an *alias venditioni exponas* issued, under which the premises were sold.

At December Term, 1826, a rule to show cause why the execution and proceedings thereon should not be set aside, was obtained by the plaintiffs in error in the District Court.

Upon the argument of this rule, several depositions were read, among which was one made by John Righter, one of the plaintiffs in error, by which it was, among other things, attempted to be proved, that Righter, after the deeds to Wunder and Hellerman had been executed, had authorized the proceedings, which afterwards took place. The admission of this deposition was objected to by the plaintiffs in error, but the court overruled the objection, and confirmed the execution and the proceedings thereon; upon which this writ of error was sued out.

The following errors were assigned in the proceedings of the court below:—

1st. That the execution and proceedings thereon are irregular, and ought to be set aside.

2d. That the deposition of John Righter was inadmissible, because he was an interested witness.

3d. That if the deposition was admissible, no agreement between him and Rittenhouse subsequent to the conveyance to

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Jacob Hellerman, can affect the premises, which had been conveyed to him.

Bradford and *T. Sergeant*, for the plaintiffs in error, argued, in the first place, in favour of the right of the terre tenant Hellerman, to bring a writ of error. They contended, that whoever is a party in interest, has a right to redress on error, and Hellerman was clearly a party in interest, being in possession of the land sold, by title derived from Righter before Rittenhouse's execution issued. If she has not this remedy, she has no other except by an action against Righter, which may not prove of much value. That a writ of error may be supported in England by any party in interest, there is abundant authority to prove, and the law is certainly not more rigid in Pennsylvania where parties in interest are often permitted to come in through the equitable powers of the court, though the form of the action in strictness would exclude them. 2 Tidd. Pr. 1053; 9 Vin. 499; Pl. 49, 50; Fritz v. Evans, 13 Serg. & Rawle, 1; Whitney v. Johnson, 14 Serg. & Rawle, 328; Hayward v. Williams, Style, 254; Ib. 280; Anderson v. Neff, 11 Serg. & Rawle, 208; Voris v. Smith, 13 Serg. & Rawle, 304; Jackson v. Robins, 16 Johns. Rep. 575; Jackson v. Bartlett, 8 Johns. Rep. 281; Lessee of Heister v. Fortner, 2 Binn. 40; Heller v. Jones, 4 Binn. 61, 65; [*275] Brannan v. Kelley, 8 Serg. & Rawle, 480; Steigleman v. Wolfersberger, 5 Serg. & Rawle, 167; Clippinger v. Miller, 1 Penn. Rep. 72.

The proceedings in the court below were the subject of a writ of error. The principle laid down in the books is, that it lies to whatever is matter of record, but whatever is out of the record rests in the discretion of the court below, and whatever is matter of pure discretion with the court below, cannot be reviewed in a court of error. The error suggested here, is in the issuing of the execution, which is clearly matter of record. The depositions and papers returned with it, which the defendant in error alleges to be matter *in pais*, came from himself in order to obtain relief, and were by him engrafted on the record. The question whether a paper be a part of the record or not, does not depend on the nature of the paper, whether deposition, deed or otherwise, but on its being connected with the record so as to constitute a component part of it. In *Duncan v. Harris*, 17 Serg. & Rawle, 436, an affidavit taken in the court below and brought up by writ of error as part of the record, was made the ground of the decision of this court. There is a class of cases in which the power of the court below is absolute and beyond the reach of a writ of error, such as motions for a new trial, motions for relief, proceedings in domestic attachment, &c.,

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but they consist of matters incidental to or disconnected with the regular course of judicial proceedings. The case under consideration is one on the boundary line of the two classes, but certainly on the record side of the boundary. The court ought to be liberal in extending relief by writs of error as they have been favourites of the legislature and are essential to the due administration of justice. They are objectionable only, where as in *Bailey v. Wagoner*, 17 Serg. & Rawle, 327, the party in the first instance resorts to this court for relief without previously applying to the court below, or by his laches waives the objection. Neither of these reasons against a writ of error applies here, because application was made to the court below immediately after the sale, antecedently to which the party was not aggrieved. This is a case of excessive hardship on the alienee, who has paid for the land, and if she cannot get redress here, the plaintiff in error must pay for it again. If a *scire facias* had been issued, Hellerman might have been saved from the payment to Wunder. The doctrine of notice is greatly cherished, and the object of a *scire facias* is to give notice to all who have claims, to come in and defend. Far from being an antiquated proceeding our legislature have shown a strong disposition to extend its operation. It is the favourite mode of giving notice. The lien of a judgment, which was formerly indefinite, is now limited to five years, unless a *scire facias* issues within that period to revive it. *Renninger v. Thompson*, 6 Serg. & Rawle, 1; *Tidd. Pr.* 105; *Bank of Penn. v. Latshaw*, 9 Serg. & Rawle, 9; *McCullough v. Guetner*, 1 Binn. 214; *Ordroneaux v. Prady*, 6 Serg. & Rawle, 510; *Woods v. Young*, 4 Cranch, 238; *Wellock v. Cowan*, 16 Serg. & Rawle, 318; *Robeson v. Whitesides*, 16 Serg. & Rawle, 320; *Kalbach v. Fisher*, 1 Rawle, 323; *2 *Arch. Pr.* 76; *Vastine v. Furey*, 2 Serg. & Rawle, 426; *Dunlop v. Speer*, 3 Binn. [*276] 172; *Lewis v. Smith*, 2 Serg. & Rawle, 142; *Reynolds v. Corp.*, 3 Caines Rep. 267; *Vanderheyden v. Gardenier*, 9 Johns. Rep. 79; *Leiper v. Levis*, 15 Serg. & Rawle, 113.

As to the consent of Righter to the issuing of the execution, no act of his subsequent to the alienation, could affect the property conveyed to Hellerman. *Patton v. Goldsborough*, 9 Serg. & Rawle, 47; *Babb v. Clemson*, 12 Serg. & Rawle, 328; *Packer v. Gonzalus*, 1 Serg. & Rawle, 526; *Kean v. Ellmaker*, 7 Serg. & Rawle, 1.

J. Randall for the defendant in error, contended that a writ of error would not lie to reverse an execution, where the question turns on facts not appearing on the record, or where the law and facts are blended. In such cases, it is purely a matter of discretion with the court below, and not the subject of re-

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view. In all cases, in which an execution has been reversed upon error, the facts on which the question arose, appeared on the record. The law on this subject is settled by repeated decisions. *Miller v. Spreeher*, 2 Yeates, 162; *Shortz v. Quigley*, 1 Binn. 222; *Wright v. Small*, 2 Binn. 93; *Lessee of M'Clemons v. Graham*, 3 Binn. 88; *Burd v. Lessee of Dansdale*, 2 Binn. 89; *Mixell v. Bradford*, 2 Serg. & Rawle, 488; *Lewis v. Wallick*, 3 Serg. & Rawle, 412; *Gratz v. Phillips*, 14 Serg. & Rawle, 151; *Barnet v. Ihrie*, 1 Rawle, 53; *Kalbach v. Fisher*, 1 Rawle, 323; *Brooks v. Hunt*, 17 Johns. Rep. 484.

Hellerman is a stranger to this record, and no stranger can take out a writ of error. 9 Vin. 493; Error K. pl. 3, pl. 20 to 25. A terre tenant cannot take out a writ of error. The remedy is by *audita querela*. *Wilson v. Watson*, 1 Peters' C. C. Rep. 272; 6 Com. Dig. 445. Notice to a terre tenant of a *scire facias post annum et diem* is not necessary. It is the personal privilege of the defendant, which he may waive if he pleases, and he has done so here. The delay of execution was at his request. It was afterwards issued with his consent, and he, and all claiming under him, are estopped by his act. Notice to an alienee is only by virtue of our act of assembly, and is directed in reference to a particular object; the revival of a judgment, not for the purposes of execution, but to continue its lien after the expiration of five years. But there is no authority or practice to support the position that *scire facias post annum et diem* must be served on an alienee. Besides, as the deed from Richter had not been recorded, there was no necessity for a *scire facias*, either under the stat. Westminster 2, or our act of assembly. No notice of the alienation by Richter, as whose property the land was sold by the sheriff, was traced to Rittenhouse, and therefore if a *scire facias* had issued, it could not have been served on the alienee. There is another ground on which the plaintiff in error is not entitled to redress at this time. If the right to it ever existed, it has been lost by neglect. The original *feri facias* issued in 1823, and the motion to set it aside was not made until 1826. This was too late. Third persons [*277] *who complain of irregularity in process as injurious to them, must apply for redress in due time. Here the party asserting the irregularity lies by for a long time, and then endeavours to deprive the defendant of the benefit of his judgment, subject to which the property was sold. The proceeds of the sale by the sheriff have long since been distributed among the judgment creditors, and no case can be adduced, in which after a year had elapsed from the time the money had been distributed, a writ of error has been sustained, and all the

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alleged irregularities of process overhauled. He cited *United States v. Harford*, 19 Johns. Rep. 173; *Long v. Martin*, 2 Marsh. Rep. 39; *Young v. Taylor*, 2 Binn. 228; 1 Troubat & Haley's Practice, 308; *Clark v. Israel*, 6 Binn. 391; *Seymour v. Greenville*, Carth. 283; 2 Shower, 235; 2 Arch. Pr. 78; 2 Tidd. Pr. 1004; *Snyder v. Zimmerman*, 1 Penn. Rep. 293; *Crosby v. Massey*, Ib. 229; *Cochran v. Cummins* 4 Yeates, 136; *Welch v. Murray*, Ib. 196.

The opinion of the court was delivered by

KENNEDY, J.—The principal question which has arisen in this case is, whether a *fiery facias* issued by the consent of the defendant, more than a year and a day after the date of the judgment, and levied upon land owned by him at the time of entering the judgment, upon which the judgment was and continued to be a lien from its date to the levy, but which was sold and conveyed by him within the year and a day, and before the issuing of the execution, is regular as against his alienee?

At common law after a year and a day had elapsed from the date of the judgment in personal actions without execution being issued thereon by the plaintiff, a presumption arose that the defendant might be able to show that it was paid or discharged; and after that, without affording him an opportunity to do so, the plaintiff could not take out execution upon his judgment. To enforce the payment of it, he was compelled to bring an action of debt upon it, and to prosecute the same until he obtained a new judgment, upon which he might sue out execution. To avoid the delay that attended this course of proceeding, the statute of Westminster, 2d, [13 Ed. 1,] c. 45, gave a *scire facias* upon the judgment in such actions after a year and a day, requiring the defendant to show cause, if any he had, why the plaintiff should not have execution of his judgment. An execution sued out after the year and a day was never considered void, but voidable merely, and it would therefore seem, might be rendered regular and effectual by circumstances occurring before, at, or subsequent to the time of suing it out. See *Vastine v. Fury*, 2 Serg. & Rawle, 426; *Patrick v. Johnson*, 3 Lev. 404; *Howard v. Pitt*, 1 Salk. 261, and in this last case, 4 Leo. 197, was denied to be law. The reason of this principle of the common law was to protect the defendant against surprise and the payment of the judgment a second time, as it might be presumed from the delay of the plaintiff in issuing his execution, that the defendant had paid it once already, or *obtained a release; but where the defendant, to obtain [278] favour and indulgence for himself, has by request or entreaty, prevailed upon the plaintiff to delay suing out execu-

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tion against him, or has by taking out a writ of error, or by filing a bill in equity, prevented the plaintiff from issuing execution within the year and a day, it is manifest that no such presumption can arise. See *Michell v. Cue*, 2 Burr. 660; *United States v. Hanford*, 19 Johns. Rep. 173; *Lessee of Dunlop v. Speer*, 3 Binn. 172. Wherever then the reason of the rule, which forbade the issuing of the execution upon the judgment after the year and a day, ceases to exist, the rule itself becomes inapplicable, and the execution ought to be considered regular. This deduction is in accordance with the cases just cited; and agreeably to them it is not necessary that an agreement or request of the defendant and consent of the plaintiff to delay execution beyond the year and a day in order to enable the plaintiff to issue it afterwards without a *scire facias* and revival, should be entered upon record or even reduced to writing. A verbal agreement, or request and assent, will be sufficient, and if objection should be made by the defendant to the execution having been issued, the court will inquire into the truth of all such matters if they be alleged, and decide according to the facts as they shall find them to be.

In the case under the consideration of the court, the plaintiff in the judgment in the court below, delayed issuing execution upon it at the request of Richter, the defendant in the judgment. This appears from the affidavit of Richter himself, and better or more conclusive evidence of the fact could not reasonably be asked for. If the application to set aside the execution had been made by the defendant himself in the judgment, it will not admit of a doubt, but that the court below under the circumstances disclosed must have refused it. As respects him at least the execution must be considered perfectly regular.

But it is contended, that because the defendant in the judgment, shortly after the entry of it, and before it became payable, sold and conveyed the land taken in execution for a fair price to Henry S. Wunder, who sold and conveyed the same to Jacob Hellerman, who died seised of it, and the application to set aside the execution was made by the heir of Hellerman to whom the land descended, no consent or request of Richter, the defendant in the judgment and execution, or act of his could authorize or make regular the issuing of the execution upon this judgment after the year and a day. No authority has been referred to, which would seem to sustain this proposition. Indeed I think that the course of proceeding in our courts to enforce the payment of judgments has generally been in opposition to it. If a *scire facias quare executio non fieri debeat* had been issued upon this judgment and been served upon the defendant alone, it would have been sufficient to have entitled the plaintiff to a re-

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vival of his judgment, and under an execution issued thereon in case personal property of the defendant could not have been found, he could have *levied upon any lands, whether [*279] sold and conveyed by the defendant or not, upon which the original judgment was and still continued to be a lien; unless a satisfaction or release of the judgment could have been shown. It is not, however, alleged or pretended by the party complaining here, that any defence whatever existed or could have been made against an execution being issued, had a *scire facias* instead of the execution been issued at the same time.

In such a case as long as the defendant to the judgment is alive, I believe it has ever been considered sufficient throughout this state, in practice, to serve the writ of *scire facias* upon him alone, without notice to the terre tenants where there are any. But if the doctrine contended for by the counsel of the terre tenant in this case be true, a service of the *scire facias* upon the defendant alone, who made and could make no valid objection to the revival, would not or at least ought not to entitle the plaintiff to a revival of the judgment, and an execution upon it against land bound by it, but sold by the defendant, because such revival is only in effect an admission of the defendant, entered upon record to be sure, but we have already shown that that does not vary the principle or the effect, that he had no good reason to show why the plaintiff should not have execution of his judgment. That admission, the defendant under the sanctity and obligation of an oath, has made in the present case. I have never known, I believe, an instance of a *scire facias* issued under the provisions of the statute of Westminster, 2d c. 45, without any view to continue the lien of the judgment as required under our act of assembly of the 4th of April, 1798, by the original plaintiff against the original defendant, in which it was served upon or notice given of it to any other than the defendant, when he was to be found. Neither the statute of Westminster, nor our act of assembly of 1705, which subjects lands to execution, and sale for the payment of the debts of the owner, requires it. As long as the parties to the judgment continue to be the same, and in full life, a service of such a *scire facias* upon the defendant upon record to the judgment has been uniformly, as I believe, deemed sufficient to obtain a revival and execution against all lands, upon which the original judgment was and still continues to be a lien. See *Young v. Taylor*, 2 Binn. 228. The defendant upon the record to the judgment while living is considered in law as the only defendant and party bound to pay it, when the judgment is against him in his own right, and no voluntary alienation by him of his lands bound by the judgment, or any part of them, can change his character of

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party as defendant : in short he cannot in this way divest himself of the character of defendant to the judgment, nor impart it to the vendee or alienee of his real estate. In case of the defendant's death, he of course ceases to be a party to the judgment, and of necessity some other must be substituted before execution can be had of it. The law in this event has designated the executors or administrators of the deceased as the persons to be substituted, which is done by issuing and serving upon them a writ of *scire facias*.

[*280] *Here again, if we advert to the usual course of proceeding on the part of the creditors to obtain payment by suit out of the lands or real estate of the deceased debtor, we shall find it altogether at variance with the principle urged on behalf of the terre tenant in this case. Lands in this state are not only assets for the payment of the debts of all grades of the deceased owner, but immediately upon his death, become bound for the payment of them, and they continue to be a lien upon the land for the space of seven years from the death of the debtor without any suit being brought, and if suit be commenced within that time, then without limitation. This lien is created by operation of law and quite as strong and effectual in every respect as the lien of a judgment, and the land of the deceased debtor in the hands of his heirs or their alienees may be taken in execution and sold upon a judgment obtained in a suit brought against the administrators or executors of the deceased, without any notice whatever to the heirs or their vendees in case they shall have sold the land. Nay, more, the administrators or executors may appear voluntarily in an amicable action instituted at any time, within seven years after the death of the debtor, by agreement between them and the creditor, and confess a judgment to him for the amount of his debt, without notice to the heirs or their vendees, upon which the creditor may issue execution, and sell as much of the land as shall be necessary to satisfy his judgment. All this is either expressly recognised or plainly inferable in and from what is said by this court in the case of *Fritz v. Evans*, 13 Serg. & Rawle, 14.

If terre tenants have notice of suits or any proceeding in court, which may affect their interest, and know of any defence, upon application made by them to the court for that purpose in due time, they would certainly be permitted to make it. This appears from the case last cited. Under certain circumstances, such as where the plaintiff in the judgment became the purchaser at sheriff's sale of the land, and brought his ejectment to recover the possession of it from the terre tenant, who had no previous opportunity afforded him of making defence against the justice of the plaintiff's debt, for which he obtained judg-

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ment, and sold the land, the terre tenant would no doubt be permitted to set up the same defence against the plaintiff in the action of ejectment, which he might have done in case he had notice of the plaintiff's obtaining his original judgment. See *Nace v. Hollenback*, 1 Serg. & Rawle, 540. It is also proper to consider by whom it was that the law after a year and a day presumed, that the judgment might have been paid? certainly no other than the defendant upon the record, for he was the only person known to the law, who was bound to pay it, and if he said it was not paid or satisfied, all presumption of its being so vanished at once. This presumption was the only obstacle after the year and a day, that was thereby raised to the issuing of execution upon the judgment; and that being removed by the declaration of the defendant in the *case before the court, it [*281] follows that the execution was perfectly regular, and ought not for that cause to have been set aside.

All that I have said of issuing and serving the writ of *scire facias* must not be understood as applicable to writs of *scire facias* issued under our acts of assembly for the special purpose of continuing the lien of judgments beyond five years. The directions of the acts, in this behalf, ought to be followed in such cases. No question growing out of these acts, or any of them, is involved in this case; for it is admitted, and, indeed, cannot be denied, that the judgment, at the time the execution was issued, and the levy was made under it, was, and still continued to be, a lien upon the land taken in execution. This levy, according to the decisions of this court in the cases of *Young v. Taylor*, 2 Binn. 218, and *Commonwealth v. McKesson*, 13 Serg. & Rawle, 149, preserved and continued the lien of the judgment upon the land, until it was sold by the sheriff under the writ of *venditioni exponas*.

A question was also raised and argued in this case, whether this court, upon writ of error, could judge of the legality of issuing the execution after the year and a day, where it involved a matter of fact, which did not appear upon the record, that is, whether the delay in issuing it until after the year and a day, was in compliance with the request of the defendant, and out of indulgence to him, and had to be inquired of and ascertained by evidence *aliunde*. At one time, when it was adjudged that the year and a day invariably commenced running from the date of the judgment or the *cesset executio* actually entered upon the record, and that nothing short of such entry upon the record could make an execution regular, that was issued more than a year and a day after the date of the judgment, the execution would have been reversed or set aside upon writ of error, if it appeared to have been issued more than the year and a day after the judg-

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ment or stay of execution entered upon the record. For it was resolved in *Patrick v. Johnson*, 3 Lev. 404, already cited, that the execution sued out after the year was not void, but voidable only by writ of error. Or it might have been set aside on motion to the court from which it issued, as was done in *Sympson v. Gray and wife*, Barnes, 197. And since the idea that the execution, in order to be regular, must in all cases be issued within either a year and a day after the date of the judgment, or the expiration of the stay given and entered upon the record, has been exploded, and no longer to be considered law; and according to the law as it is now well settled on this point, it may be necessary for the court to inquire into matters of fact which do not appear upon the record, but are *de hors*, for the purpose of deciding whether the execution has been sued legally or not, it would seem as if a writ of error in such case would be of no avail, especially where, as in this case, the application was made to the court below to set aside the execution, and that court, after hearing the testimony adduced of the defendant's having requested all the delay that took place in issuing the execution, decided, as it was [*282] right it should do upon *the whole matter, consisting of questions of fact as well as of law. Whether the court below decided the law correctly or not in relation to this matter, must depend upon how they found the facts involved in it: and how is it possible for this court to review the decision of the court below as to the facts? It appears to me, that it cannot be done because that court is deemed in law to be as competent to ascertain and decide upon the facts in such a case as this court. There are many summary proceedings and decisions in the courts below, which cannot be reached or touched upon writs of error. See *Miller & al. v. Sprecher*, 2 Yeates, 162; *Shortz v. Quigley*, 1 Binn. 222.

I am opinion for these reasons, that this court upon the writ of error in this case, cannot revise, and correct, or reverse the judgment of the court below, which refused to set aside the execution, even if it were so, that the court below had, from the evidence adduced, decided the facts differently from what this court might think, that they ought to have done.

The judgment and proceedings upon it in the court below are affirmed.

Cited by Counsel, 4 R. 366; 5 Wh. 486; 4 W. 368; 9 W. 26; 3 W. & S. 471; 8 H. 258; 11 H. 184; 6 C. 518; 2 Wr. 485; 9 N. 330, s. c. 7 W. N. C. 516; 15 N. 473; 2 W. N. C. 422.

Cited by the Court, 3 S. 451; 32 S. 75.

An application to set aside an execution is an appeal to the equitable power of the court. It necessarily rests upon the facts of the case, and therefore the decision of the court, being a decision as to what the *facts* are, is not reviewable. 27 S. 502, s. c. 1 W. N. C. 423.

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Although a deed purporting to convey a title to land, cannot be given in evidence without some proof of title in the grantor, yet the rule does not apply in the same extent, to a deed containing merely an executory contract between the parties, for the future procurement and conveyance of a title to land.

The plaintiff having given in evidence thirty-seven patents dated the 12th March, 1795, to J. P. for certain lands in the county of N. which were the lands in dispute, and a deed dated the 12th July, 1795, for the same lands from the patentee to J. W. and a deed of previous date, viz., the 17th March, 1795, for the same lands from the said J. W. to the plaintiff, without any evidence to show, that J. W. at that time, had any interest in them or any prospect of acquiring any, and without showing under what arrangement, J. W. obtained the subsequent deed from J. P. the defendant, with a view to show, that J. W. obtained the deed from J. P. in pursuance and fulfilment of articles of agreement, which he had entered into with W. P. and M. W. on the 11th September, 1794, prior to the deed from J. W. to the plaintiff, offered the said articles of agreement in evidence, stating that he should also offer in evidence bonds and a mortgage given in pursuance of the said articles of agreement. Held, that the articles of agreement were admissible in evidence to show the origin of J. W.'s connection with these lands; what his interest was before and at the time he conveyed them to the plaintiff, and the terms and conditions upon which he subsequently obtained the title by conveyance from J. P.

A deposition of one, who, when it was taken, was not a party to or interested in the suit, but afterwards became so, is not admissible in evidence. But where the parties to a suit depending in this court, entered into a written agreement, "that the evidence which had been taken in the ejectment depending in the county of I. of B. C. v. J. B. and others, and also against C. D. shall be admitted to be read on the trial, saving all legal exceptions, which might have been made in these actions," it was held, that such deposition was admissible in evidence, though the action in which it was taken was not then depending, but had been tried and determined before the date of the agreement; it appearing that the suit in which the deposition was taken, was the only ejectment that B. C. had ever brought against J. B. and others in the county of I. and the deposition offered the only evidence taken in that suit.

Deeds, not shown to have any bearing upon the matter in controversy, are not admissible in evidence.

Where the judge, who tried the cause, stated to the jury, that he thought they would agree, that unless those persons who were interested in the land, and sold it to J. W. consented, and most explicitly, that he should have it clear of all claim on account of the purchase-money, it would not be just or equitable that he should have it so, the charge was held to be right, taken in connection with all the evidence given in the cause.

THIS was a feigned issue in the form of an action upon a wager, in which Benjamin Chew was plaintiff, and Jeremiah Parker, defendant, framed by the agreement of the parties for the purpose of trying the title to thirty-six tracts of land in Jefferson county, in the state of Pennsylvania, and it was agreed by writing filed, that the decision of the questions raised by the issue, should in all respects, have the same effect upon the title

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to the lands in dispute, as if a verdict had been given in an action of ejectment.

On the trial of the cause before his honour Judge Kennedy, on the 23d of February, 1831, the plaintiff, in the first place, gave in evidence a deed from Jeremiah Parker to James Wilson, [*284] conveying to *him in fee simple, the lands in dispute for the consideration of thirteen thousand and twenty pounds nineteen shillings and eight pence, dated 12th July, 1795, acknowledged the 25th July, 1795, and recorded in the county of Lycoming, in which the lands were then situated, on the 18th October, of the same year. He then gave in evidence thirty-seven patents to Jeremiah Parker for the same lands, dated the 12th March, 1795, and a deed from James Wilson, conveying the same lands to Benjamin Chew, the plaintiff, in fee simple, for the nominal consideration of five pounds with special warranty and a covenant for further assurance, and containing also a stipulation, that patents should be taken out in the name of the plaintiff. This deed bore date the 17th March, 1795, was recorded in Northumberland county on the 7th September, 1795, and in Indiana county, on the 23d November, 1818. Though the consideration expressed in the deed was only five pounds, it was proved, that the real consideration for the conveyance was the transfer by Mr. Chew to Mr. Wilson, on the 16th and 17th March, 1795, of stock of the banks of the United States and Pennsylvania to the amount of eighteen thousand dollars. The plaintiff further proved by the deposition of John Adlum, that William Parker and Moore Wharton, whose connection with these lands will hereafter appear, had notice of the sale to Mr. Chew within a few days after it took place, and that the offices for public business were not opened in Lycoming county until the month of November, 1795.

After the evidence above stated had been given by the plaintiff, the defendant offered in evidence articles of agreement, dated the 11th September, 1794, between William Parker and Moore Wharton of the one part, and the said James Wilson of the other part, by which Parker and Wharton agreed to cause to be conveyed to Wilson seven large bodies or parcels of land, including the lands in dispute, at the price of one dollar per acre. By the agreement, patents were to be taken out in the name of James Wilson, who was to execute one or more bonds for the sum which the price of the lands would amount to, payable in five years from the 14th May, 1794, without interest, and to execute a mortgage on the same lands or on other lands of equal quantity and quality as a collateral security for the payment of the money mentioned in the bonds.

It was further agreed, that if the said James Wilson after

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having executed such mortgage, should at any time be desirous to have the same cancelled and to give another mortgage upon other lands equal in value thereto, he should be at liberty to do so, and the said Parker and Wharton and their assigns, should accordingly cancel the first mentioned mortgage, and accept such new mortgage in lieu thereof.

These articles of agreement were produced by the plaintiff upon notice from the defendant. The plaintiff's counsel objected to their being read in evidence, because they were between William Parker and Moore Wharton of the one part, and James Wilson of the other part, Jeremiah Parker, the owner of the land, not being a party *to them. The objection was [*285] overruled by the judge, who permitted the articles to be read in evidence to the jury.

The defendant then gave in evidence a paper, (also produced by the plaintiff, on notice.) dated the 14th of May, 1794, signed by the said Parker & Wharton and James Wilson, indorsed "Agreement, Parker & Wharton with James Wilson," by which Parker & Wharton offered the seven bodies of lands afterwards enumerated in the articles of the 11th of September, 1794, for sale, to the said James Wilson, at the price of one dollar per acre, payable in five years from the 14th of May, 1794, without interest; the patents to be delivered clear of all disputes and incumbrances.

The defendant also gave in evidence the following documents, viz.: 1. A mortgage dated the 14th of October, 1795, and recorded in Northumberland and Lycoming counties on the 20th of October, 1795, from James Wilson to William Parker and Moore Wharton upon the lands in dispute, and other lands enumerated in the articles of agreement already referred to, to secure the payment of bonds bearing even date with the mortgage from James Wilson to Jeremiah Parker, William Parker and Moore Wharton, amounting in the whole to the sum of twenty-five thousand one hundred and twenty-two dollars, payable to Jeremiah Parker, and twenty-eight thousand five hundred and twenty-two dollars to Parker & Wharton.

2. The following bonds from the said James Wilson, viz.:

A bond to Jeremiah Parker, dated the 13th of July, 1795, conditioned for the payment of ten thousand one hundred and twenty-two dollars, on the 14th of May, 1799.

One bond of the same date, to the same, conditioned for the payment of three thousand dollars, on the same day.

One bond of the same date, to the same, conditioned for the payment of six thousand dollars, on the same day.

One bond of the same date, to the same, conditioned for the payment of six thousand dollars, on the same day.

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Two bonds of the same date, to Parker & Wharton, conditioned for the payment of six thousand dollars each, on the same day.

Two bonds of the same date, to the same, conditioned for the payment of three thousand dollars each, on the same day.

Two bonds of the same date, to the same, conditioned for the payment of two thousand five hundred dollars each, on the same day.

Two bonds of the same date, to the same, conditioned for the payment of two thousand dollars each, on the same day.

And one bond of the same date, to the same, conditioned for the payment of five hundred and twenty-two dollars on the same day.

The deposition of William Parker taken in the case of Benjamin Chew against Joseph Barnett and others, was then offered in evidence by the counsel for the defendant, in connection with an agreement entered into in this action, which contained the following clause: "That the evidence which has been taken in the ejectment depending in the county of Indiana for Jefferson [*286] county, of Benjamin Chew *against Joseph Barnett and others, and also against Ira White, shall be admitted to be read on the trial, saving all legal exceptions, which might have been made in those actions." At the time this deposition was taken, the deponent had no interest in the lands in dispute, but afterwards became interested in them under the will of Jeremiah Parker, who was his brother. The plaintiff's counsel having proved by an agreement exhibited to the judge, that the said Jeremiah Parker was the real defendant in the suit in which the deposition was taken, and that that suit was for part of the lands now in dispute, objected to the admission of the deposition in evidence, on the ground, that the deponent was the executor of the will of the said Jeremiah Parker, and the devisee of the lands in dispute; that he was by substitution, the actual defendant in the cause, and then present in court. His honour, however, permitted the deposition to be read in evidence.

The defendant's counsel then gave in evidence the record of a *scire facias* and an *alias scire facias* in the county of Lycoming, on the mortgage given by James Wilson to William Parker and Moore Wharton, in which judgment was entered on the 30th August, 1803; and a writ of *levari facias* on the said judgment, returnable to December Term, 1803, to which the sheriff returned, that he had sold the lands in dispute to William Parker, Moore Wharton, and Jeremiah Parker.

A deed bearing date, the 7th December, 1803, from the sheriff of Lycoming county to Jeremiah Parker, for the consideration of three thousand five hundred dollars, was then

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offered in evidence by the defendant's counsel, and objected to by the counsel for the plaintiff, but the court overruled the objection and admitted the evidence.

The defendant having closed his testimony, the plaintiff after having given some evidence not now material, offered in evidence a deed bearing date, the 21st September, 1796, recorded on the 30th January, 1797, from Josiah Hewes and Myers Fisher, trustees of James Wilson, and James Wilson to George Eddy and Moore Wharton, conveying divers large bodies of land, containing seventy-three thousand acres in Lycoming county, for a nominal consideration and for the sum of fourteen thousand seven hundred and fifteen pounds, paid to James Wilson, offering at the same time to show, that one-half of the greater part, or the whole of the said lands had been shortly after conveyed for a nominal consideration to William Parker, the defendant, the other half remaining with Moore Wharton. This deed was objected to by the counsel for the defendant, and rejected by the court.

A mortgage dated 14th June, 1794, from James Wilson to Charles Wolstencraft and others, and the proceedings thereon in the Court of Common Pleas of Lycoming county, for the use of the said William Parker, were then offered in evidence by the plaintiff, accompanied by an offer to show, that all the lands embraced by the mortgage, had been conveyed for a nominal consideration to William and Jeremiah *Parker. This deed was rejected by the court on an objection to it [*287] being made by the counsel for the defendant.

The plaintiff's counsel, after having given in evidence the deposition of William Anderson, recorder of Bedford county, showing that the last mentioned mortgage had been entered to be recorded by William Parker, who declared, that he was a party in interest to it, offered it again in evidence with the proceedings thereon; but the evidence was again objected to by the defendant's counsel and overruled by the court.

Some other testimony was given on the part of the plaintiff, which it is unnecessary now to state.

The evidence on both sides being closed, his honour Judge Kennedy, after having minutely stated the facts, delivered to the jury the following

CHARGE:—I have said, gentlemen of the jury, that if no other testimony had been given in this cause than that which was given by the plaintiff in chief, or to establish his claim in the outset, he would have been entitled, in my opinion, to recover; but if the defendant, from the testimony given on his part, has satisfied you, that the deed of conveyance from Jeremiah Parker to James Wilson, dated on the 12th of July, 1795,

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was made without the purchase or consideration-money being paid, and that it was made subject to or in pursuance of an agreement, that the land itself was still to remain liable for the payment of it, then it is clear that Judge Wilson did not under that conveyance obtain a title for the land discharged from the claim of Parker and Wharton or Jeremiah Parker to the purchase-money. The first question then is, was the consideration-money, that is, the thirteen thousand nine hundred and twenty pounds nineteen shillings and eight pence, equal to thirty-seven thousand one hundred and twenty-two dollars and sixty-two cents, mentioned in that deed, paid by Wilson to Jeremiah Parker or to any other person entitled to receive it? It is true, that the deed contains an acknowledgment by Jeremiah Parker of the receipt of this money, and a receipt for the same is subjoined to the deed of conveyance. But you must consider that this is almost the universal form, in which deeds for conveying lands, are made and executed, as well where the money is paid, as where only notes or bonds or a mortgage with notes or bonds are given or intended and agreed to be given afterwards. Such acknowledgment and receipt in the absence of direct testimony, showing that it was otherwise, or circumstances raising a contrary presumption, would be sufficient evidence of the consideration-money having been paid. But still it is very slight evidence of the fact, when we know, that it is nearly the universal practice to give such an acknowledgment and receipt, whether the money be paid or not, and when we also consider, that it is not usual in making private sales of lands throughout the state to sell for cash to be paid in hand, but to allow a credit for a part of the purchase-money at least. [*288] Beside positive proof of the purchase-money not having been all paid at or before the execution of the deed, when the deed appears to have been executed shortly after the making of the contract for the purchase, the circumstance of the price being a very large sum of money, such as the purchaser could not well have raised, in connection with proof, that by the terms of the contract for the sale of the land the purchase-money was not to be paid for five years, although the deed was to be made as soon as the sellers could get the title to the land perfected, would be most likely sufficient to satisfy the minds of a jury, that the money was not paid at the execution of the deed. But if, in addition to this, it should appear, as in the present case, that bonds bearing date the next day after the date of the deed of conveyance, and a mortgage dated about three months afterwards, were given by the purchaser to the seller for the precise amount of the purchase-money, payable too on the very days fixed for that purpose in the original contract of sale, could

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any jury entertain a doubt, that the purchase-money was not paid? Indeed, I do not understand the counsel for the plaintiff to urge, that from the testimony given in this case, the purchase-money was paid by Judge Wilson at or before the execution of the deed. The subsequent transaction between him and Parker and Wharton and Jeremiah Parker show, I think, most clearly, that it was not.

Then if it was not paid, did James Wilson take the thirty-six tracts of land, conveyed to him by that deed from Jeremiah Parker, freed and discharged from the purchase-money? I think you will agree, that unless those persons who were interested in the land and sold it to him, consented and agreed most explicitly, that he should have the land clear of all claim on account of the purchase-money, it would not be very just or equitable that he should have it so.

What evidence then have you that such was the agreement, that is, that Judge Wilson should have these thirty-seven thousand one hundred and twenty-two acres free from all claim by the sellers on account of the purchase-money?

In the first place it is argued, that by the original agreement of the 14th of May, 1794, or proposals for sale of these and other lands by William Parker and Moore Wharton, no mortgage or anything else that would create a lien upon the land, was agreed to be given, because it is not so mentioned. It is manifest that as an agreement stipulating and providing for anything that would be necessary to be done to carry the sale contemplated into execution, it was very imperfect, and that something more than is there expressed was understood by the parties to be done. You will observe that a credit of five years was to be given for the payment of the purchase-money, but not a word in these proposals about how or in what way the payment of that purchase-money shall be secured. No mention of even bonds or notes being to be given for it. Can you believe that something of this kind at least was not intended? Did you ever know an instance *of land being sold for [*289] any considerable sum of money and not to be paid for several years, that the deed of conveyance was made by the seller and delivered to the buyer without something more than such a paper as these proposals, taken to secure the payment of the purchase-money?

But if there were any doubt of this, the formal agreement between William Parker and Moore Wharton of the one part, and James Wilson of the other, dated on the 11th of September, 1794, completely removes and does it away. In this agreement, it is expressly agreed and provided, that not only bonds, but a

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mortgage shall be given upon the land itself or other land of equal value to secure the payment of the purchase-money.

Here, however, it is contended by Mr. *Ingersoll*, that inasmuch as by the terms of this agreement, the mortgage was not necessarily to be on those lands, but to be given on other lands at the election of Mr. Wilson, the agreement would not give or continue any lien upon the land after the conveyance of it, without the execution of the mortgage, because when executed, it might not be on this land at all. This argument or distinction, although ingenious, I think, is not sound. The land sold is the only land that is designated for the mortgage. The articles of agreement do not describe any other particular land upon which a mortgage may be given for this purpose, and until James Wilson should point out other lands, and show also that he had a good title for them clear of incumbrances, and that they were of equal value, and execute a mortgage upon them to the sellers, the operation of the articles of agreement would be precisely the same as if no such alternative in favour of Judge Wilson had been introduced into them. If the alternative provided for in the articles of agreement had been that bonds or a mortgage should be given at the election of Mr. Wilson, and bonds only had been given, the effect might have been different.

But it is worthy of remark, that the sellers appear to have been anxious to have the payment of the purchase-money secured by a mortgage, and according to the terms of the articles of agreement, in no event was the mortgage to be dispensed with. The mortgage seems to have been made a *sine qua non*. He might change the lands upon which he gave the mortgage, but that he must give in addition to bonds. After so much earnestness discovered in the articles on the part of the sellers to have a mortgage as well as bonds, you will probably think that pretty clear proof ought to be given of this right, thus provided for, being relinquished, before you would be warranted in coming to the conclusion, that it was.

As evidence that the taking of a mortgage under these articles of agreement, was relinquished and surrendered by the sellers, it is said that bonds were executed and given by James Wilson to them for the purchase, on the 13th day of July, 1795, the day after the execution of the deed by Jeremiah Parker to him, and that no mortgage was given until the 14th October, [290] 1795, three months afterwards. *It is true, that the dates of the deed, the bonds and the mortgage are so; but it does not follow that they were executed and delivered on the days of their respective dates. Indeed, it is most probable, it was not so. The deed of conveyance for instance is dated on the 12th day of July, 1795, but not acknowledged by Jeremiah

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Parker, the grantor, until the 25th of that month, thirteen days afterwards. Now it is very improbable, that it was delivered by him to James Wilson before it was acknowledged. It may have been, that it was drawn or written on that day, and that the bonds were written on the day following. At all events if you will examine the bonds, you will be of opinion, I think, that they are not signed with the same pen and ink with which they are filled up, and that they were therefore written at a different time from that of signing them, yet the date is evidently written with the same pen and ink with the other part of the filling up. It often happens, that a deed of conveyance is executed and acknowledged months before its delivery, yet it is of no effect whatever until delivered. Now William Parker and Moore Wharton might have gotten this deed executed and acknowledged by Jeremiah Parker, and have taken charge of it and kept it until the 14th of October following, when they received the mortgage from James Wilson, and might have delivered to him at the same time, the deed of conveyance for the land in dispute from Jeremiah Parker. One thing is certain, that this deed was not put on record until the 18th day of October, 1795, four days after the date of the mortgage. The recording of this is the first time that we have any unequivocal evidence of its being in the hands of James Wilson, and the mortgage, you will observe, was recorded the second day after the deed, which is evidence of its being in the possession of Parker and Wharton, and some evidence perhaps of the deed and the mortgage having been delivered at the same time.

It is very certain that in the execution of this transaction between the parties, they seem to have been careless about inserting dates or attending to them. They have recited the bonds in the mortgage as being of equal date with it; now that is certainly not so. The bonds produced are dated, not on the 14th day of October, 1795, the day of the date of the mortgage, but on the 13th day of July preceding. This is no doubt a mistake, because the bonds produced correspond in every other particular with those recited in the mortgage. But suppose that the deed of conveyance and the bonds were executed and delivered two or three months before the mortgage was executed and delivered, does that furnish any evidence of its ever having been relinquished by the sellers? I must confess, it does not appear so to me. If it had been so, why should James Wilson afterwards have executed the mortgage upon these lands to the sellers, when he had conveyed them away to the plaintiff, Mr. Benjamin Chew? I say, if the Parkers and Wharton had actually relinquished to Judge Wilson their right to have a mortgage upon the

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[*291] land in dispute *and had agreed, that he should have it acquitted of all claim from them, James Wilson's giving them a mortgage afterwards, when he had conveyed away the land to Mr. Chew, would be irreconcilable with every principle of honesty. Judge Wilson being considered a man of integrity and respectability at this time and so admitted by the plaintiff's counsel, it necessarily follows, that he gave this mortgage afterwards, because he was bound by his articles of agreement to do so. Again it is alleged, that these proposals and articles of agreement signed by William Parker and Moore Wharton and by Judge Wilson, being found among his papers, show that they were delivered up to him, and that all claim or right under them had been relinquished by the sellers, or they would not have given them up. This may be true, but how so? The probability is, that they gave them up after they got the bonds and the mortgage and not until then, which secured the sellers in everything that they had any right to claim under the articles. The mortgage gave them the land as a security for the payment of the purchase-money. Under this view of the case, I consider the deed of conveyance from Jeremiah Parker of these lands to James Wilson, and the mortgage again from James Wilson to William Parker and Moore Wharton, in part for themselves, and in part in trust for Jeremiah Parker, although done at different times or dates, as but parts of one and the same transaction, and that James Wilson did not thereby acquire a title to the land discharged from the purchase-money, and that according to the agreement for the sale of it to him, he could not acquire such without paying the purchase-money. If so, it necessarily follows, that no other right or title under this conveyance could enure to the benefit or use of Mr. Chew, the plaintiff, than what Mr. Wilson thereby obtained.

It is urged also, that the proposals of the 14th May, 1794, which are signed by William Parker and Moore Wharton and James Wilson, may be considered as a letter of attorney from William Parker and Moore Wharton to James Wilson, authorizing him to sell these lands, and that under this act of authority he sold them to the plaintiff, Mr. Chew. It seems to be admitted, that they are not in the usual form of a letter of attorney, but that is not material, as no particular form is required. Although no particular form is required, yet it ought at least to appear from the face of the instrument, that it was designed and intended to be a letter of attorney. It contains no words granting or delegating any power or authority to James Wilson, which is of the essence of a letter of attorney. It is signed by James Wilson, which was certainly unnecessary if intended to be a letter of attorney. I have no hesitation in saying, that it can-

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not properly be considered as a letter of attorney, authorizing James Wilson as the attorney in fact of William Parker and Moore Wharton, to sell the land in dispute. But if it were a letter of attorney, a sale of the land by James Wilson, unless made in conformity to it, would not be good. Now in these proposals or what the plaintiff's counsel has *been pleased [*292] to call a letter of attorney, there is a certain price per acre fixed upon the land to be sold, that is one dollar per acre, yet Mr. Wilson sold this land to Mr. Chew for less than fifty cents per acre. This would be sufficient to avoid the sale if it were a letter of attorney.

James Wilson, who was a distinguished lawyer himself, never appears to have treated it as a letter of attorney, nor from anything that has been disclosed, to have thought so. In making the sale to Mr. Chew, he did not pretend that he was making it, or conveying the land, as the attorney of any one.

It is also alleged by the plaintiff's counsel, that these proposals if not a letter of attorney amount to an agreement between the parties who have signed their names thereto; that when he, (Mr. Wilson,) sold to Mr. Chew, he no doubt showed them to Mr. Chew as evidence of his right to sell the land in dispute; that Mr. Adlum probably had a reference to the proposals, when he testified that a writing was produced from which a description of the land was read: that inasmuch as nothing is said about a mortgage in these proposals, or of the purchase-money of the land being to be secured by such means, Mr. Chew had, therefore, no reason to apprehend that the land would come to Judge Wilson, incumbered with the purchase-money, and that in this way the sellers of the land to Mr. Wilson, put it in his power to deceive Mr. Chew; and, although they did not intend any injury to any one, and may have been in this respect innocent, yet as they have been the occasion of the loss that must inevitably fall now upon the shoulders of them or Mr. Chew, it ought to be on theirs. Though this proposition is correct in the abstract, it becomes necessary to examine whether it be well applied here by the plaintiff's counsel. It is certain that when Mr. Chew bought the land of Judge Wilson, and took a deed of conveyance of him for it, he had no title for it. Mr. Chew, I think, had no reason to conclude either from an inspection of the proposals, dated May 14th, 1794, or from the articles of agreement, dated the 11th of September, 1794, that the sellers were not to be secured in some way, in the payment of the purchase-money, at the rate of one dollar per acre, which was not to be paid for five years; but, on the contrary, had good reason to conjecture, at least, that as the payment was deferred so long, that kind of security which was the least liable to fail would be

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required and given, to wit : a mortgage, and we find it was so. Mr. Chew was certainly bound to know before he purchased, whether Judge Wilson had any title or claim to the land, and if he had any, what it was ; and if it was not a legal title, but imperfect, it was his duty to inquire and to inform himself what would be necessary to be done to make it perfect. It is certain, that if Judge Wilson had any claim to the land at the time he sold it to Mr. Chew, it was a very imperfect one, and that Mr. Chew bought it with all its imperfections. He bought it subject to have the purchase-money secured in the way provided for by [*293] the articles of the agreement. All this Mr. Chew was *bound to know ; it was his duty to inquire. If he had inquired of the person or persons from whom Judge Wilson was to obtain the legal title, he would have known too. If they, upon such inquiry, had misrepresented the matter to him, and he had acted upon the faith of their representation, and a loss had ensued, this might have changed the complexion of the case. If Mr. Chew did not inquire, and did not know the full extent of the agreement between the Parkers and Wharton and Judge Wilson, it was his own fault, and as the loss has arisen from his own neglect or want of due vigilance, it ought to fall upon him.

In what I have said to you in respect to the giving of the mortgage, being done in pursuance of the original contract, I have only noticed the documentary testimony, which appears to be sufficient, but in addition to this, you have the positive testimony of William Parker, that the conveyance from Jeremiah Parker to Judge Wilson, as also the mortgage from Judge Wilson to W. Parker and M. Wharton, were executed and given in pursuance of that contract.

The circumstance of the parties having deviated from the letter of the contract for the sale and purchase of these lands, in some particulars, such as the patents being taken out in the name of Jeremiah Parker instead of James Wilson, makes no difference in the effect, because it did not prejudice Mr. Chew in the least, and Wilson was satisfied to take it in that form. In either way the land was still to be liable for the payment of the purchase-money, and it does not appear to me that Mr. Chew has any good cause of complaint on this account.

It is also contended that Mr. Chew is a *bona fide* purchaser for a valuable consideration, without notice, and therefore ought to be protected. This principle is only applicable where a person purchases land of another, who appears from the face of all the title papers, to have the perfect legal title to the land, nothing being on record to show the contrary, or to excite suspicion. This was not the case with Judge Wilson when he sold and con-

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veyed the land in dispute to Mr. Chew. Judge Wilson had not the legal title in him when he sold the land to Mr. Chew. He at most had only a contract with Parker and Wharton for the purchase of it, and this being the case, Mr. Chew, I again repeat, was bound to know it. He did know that Judge Wilson was not invested with the legal title, and Mr. Chew bought at his peril.

Judge Wilson did not become invested with the legal title to the land in dispute, until he received the deed from Jeremiah Parker, dated the 12th of July, 1795. Mr. Chew did not buy and pay his money after this, but in the spring before. It cannot therefore be said that Mr. Chew is a *bona fide* purchaser for a valuable consideration, without notice, as he would have been, if after the 12th of July, 1795, when Judge Wilson was in possession of the deed of conveyance from Jeremiah Parker, and before the 14th of September following, he had [*294] *bought the land and paid his money for it without notice of Parker and Wharton, or J. Parker's claim upon it for the purchase-money.

The case of Chew v. Barnett, 11 Serg. & Rawle, 389, referred to and decided by the Supreme Court of this state, is decisively in favour of the defendant, William Parker, on this point. I must confess that I have not seen in what particulars this case has been made clearly different from that of Chew v. Barnett.

The jury found a verdict for the defendant, and the plaintiff's counsel moved for a new trial, for which they filed the following reasons, viz. :

1. The court erred in permitting the defendant to give in evidence the articles of agreement dated September 11th, 1794, between William Parker and Moore Wharton and James Wilson.

2. The court erred in permitting the defendant to give in evidence the deposition of William Parker, then present in court, he being the executor and devisee of the said Jeremiah Parker, and substituted as defendant in this cause.

3. The court erred in refusing to allow the plaintiff to give in evidence a deed from Josiah Hewes and Myers Fisher, trustees of James Wilson, and James Wilson to George Eddy and Moore Wharton, dated 21st of September, 1796, for the consideration of fourteen thousand seven hundred and fifteen pounds, paid to James Wilson; the counsel for the plaintiff having offered at the same time to show by deeds then produced, that all the lands thereby conveyed, were conveyed shortly after for nominal considerations, to William Parker and Moore Wharton.

4. The court erred in refusing to allow the plaintiff to give in evidence a mortgage dated 14th June, 1794, from James Wilson to Charles Wolstencraft and others, and the record of the pro-

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ceedings thereon in the county of Lycoming, the same having been offered to show that all the lands contained in the said mortgage were for the use of, and came into the hands of the said Jeremiah Parker and William Parker for nominal considerations.

5. The court erred in instructing the jury, that, notwithstanding the alternative in the articles of agreement between Parker and Wharton and James Wilson, that other lands equal in value might be mortgaged, yet these lands in dispute remained bound by the articles with Parker and Wharton and James Wilson, after they had been conveyed to James Wilson by Jeremiah Parker, and until Wilson should actually tender a mortgage of other lands equal in value; and that the plaintiff was also bound by the said articles, and bound to know of them.

6. The court erred in charging the jury that the land was, and continued liable for the purchase-money, unless the sellers agreed most explicitly that it should not be so.

7. The counsel for the plaintiff contended, that there was [*295] evidence *to go to the jury, that any right to receive a mortgage on the thirty-six tracts in dispute from James Wilson, had been waived or relinquished by the parties, and the personal responsibility of James Wilson substituted in lieu thereof. But the learned judge who tried the cause, did not leave this fact to the jury, but instructed them that the right to receive the mortgage had not been waived or impaired.

8. The court erred in charging the jury that, although the articles of agreement with Parker and Wharton and James Wilson, stipulated that the patents for these lands should be taken out in the name of James Wilson, and the same were afterwards, on the 12th of March following, taken out in the name of Jeremiah Parker, yet that made no difference in the effect upon the plaintiff.

S. Chew and *J. R. Ingersoll*, for the plaintiff, cited *Lessee of Peters v. Condron*, 2 Serg. & Rawle, 83; *Faulkner v. Eddy*, 1 Binn. 190; *Hoak v. Long*, 10 Serg. & Rawle, 9; *Stewart v. Kingley*, 17 Johns. R. 158; *Richardson v. Stewart*, 2 Serg. & Rawle, 84; *Chess v. Chess*, 17 Serg. & Rawle, 409; *Mills v. Eden*, 10 Mod. 488; *Cheeseborough v. Millard*, 1 Johns. Ch. R. 413; *Gill v. Lyon*, *Ib.* 449; *Bank of Pennsylvania v. Winger*, 1 Rawle, 302; *Nailer v. Stanley*, 10 Serg. & Rawle, 450.

Chauncey and *Binney*, for the defendant.

The opinion of the court was delivered by

KENNEDY, J.—The first reason assigned in this case for a new trial is, that the court permitted the articles dated September

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11th, 1794, between William Parker and Moore Wharton of the one part, and James Wilson, Esq., of the other, to be given in evidence. The objection to this was, that it did not appear from any evidence previously given on the trial of the cause, that Parker and Wharton had any right, title, or interest in the land, which they thereby agreed to sell and have conveyed to Wilson; that without proof of some interest or right in the land being first shown to have existed in Parker and Wharton, the articles of agreement were not admissible in evidence, and the cases of *Faulkner v. Eddy*, 1 Binn. 190; *Peters v. Condron*, 2 Serg. & Rawle, 83; and *Hoak v. Long*, 10 Serg. & Rawle, 9, recognising and establishing the rule, that a deed is not evidence without proof of title in the grantor, have been relied on to support the objection. Now it is evident, that this rule, although perfectly correct as respects deeds of conveyance or of grant, bargain, and sale, cannot be applicable in the same extent to a deed containing merely an executory contract between the parties for the future procurement of a title to land and conveyance of the same. It is not like the case of a deed of conveyance, the design and object of which are to transfer from the grantor a right or interest in the land to the grantee, which in the very nature of things cannot be, if the grantor has no right or interest whatever to or in the land. That some right or interest did exist in him, ought therefore to be first shown, otherwise *the deed of conveyance is inoperative, and the time of [*296] reading it in evidence unnecessarily spent. In order to make an executory contract effectual between the parties, it is not necessary that the party, who thereby covenants to convey certain lands to the other party at a subsequent day, should have any right to them at the time of entering into the covenant. He is at liberty and has the right to bind himself to do anything that is not forbidden by law, or to bind himself to abstain from doing anything that the law has not enjoined him to do. If he have no title to the lands at the time of making the contract to convey, he thereby makes it his duty to get one, which is not considered at all impracticable in the eye of the law, before the time, at which he has covenanted to convey the lands, shall come round. If he should fail to procure a title and to convey it according to his stipulation, he will be liable to an action upon his covenant for a breach of it, which could not be sustained without giving the deed containing such covenant in evidence upon the trial of the cause. It is, however, contended here, that the articles of agreement were offered and given in evidence for the purpose of showing that James Wilson, from whom the plaintiff derived his title to the lands in controversy, derived his claim to them from William Parker and Moore

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Wharton, and that the articles could be no evidence of this, unless it were first shown, that these persons had an interest in or right to the lands. Here it is proper to recur to and notice that the plaintiff had given in evidence thirty-seven patents dated the 12th of March, 1795, from the Commonwealth to Jeremiah Parker, brother of William Parker, for the thirty-six thousand acres mentioned in the articles of agreement, and being also the lands in controversy in this suit, as lying in Northumberland county, on the waters of Sandy Lick creek, also a deed of conveyance dated the 12th of July, 1795, for these lands from Jeremiah Parker, the patentee, to James Wilson, and likewise a deed of conveyance of previous date to this, to wit, the 17th of March, 1795, for these same lands from James Wilson to Benjamin Chew, the plaintiff in this suit, without offering any evidence to explain or account for James Wilson's having conveyed these lands to Mr. Chew before it appeared from the plaintiff's showing that he had any interest in or right to them, or even the prospect of getting any, and without showing under what arrangement it was that Wilson obtained this subsequent deed of conveyance from Jeremiah Parker. The defendant to supply this omission, and to account for the seeming futility of James Wilson's conveying lands to the plaintiff for which it did not appear that he had even the colour of title, alleged, that Wilson obtained this deed of conveyance from Jeremiah Parker in pursuance and fulfilment of those articles of agreement which he had entered into with William Parker and Moore Wharton on the 11th of September, 1794, and that this would still further appear from bonds and a mortgage, which were executed and given, as provided for in the articles of agreement, and would

[*297] also be given in evidence. With a view then *to show the origin of Mr. Wilson's connection with these lands, what his interest in them was at the time and before he conveyed them to Mr. Chew, as also the terms and conditions upon which he obtained the title subsequently for them by the deed of conveyance from Jeremiah Parker, the articles of agreement were offered in evidence by the defendant's counsel and permitted by the court to be read. This court is of opinion, that these articles of agreement were properly admitted to be given in evidence to the jury; for according to the doctrine and principles laid down by this court in *Chew v. Barnett* and others, 11 Serg. & Rawle, 389, Mr. Chew, the plaintiff in this cause, could have no other or better title under his deed from Wilson than Wilson himself acquired by his deed of conveyance subsequently obtained from Jeremiah Parker, which, if made subject to the terms and conditions set forth in the articles of agreement, rendered them not only relevant and admissible against James

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Wilson in case he had been the plaintiff here, but likewise against Mr. Chew, who claims under him.

The second reason is, that the deposition of William Parker, who is not only the party on record to this suit, but the real party in interest, was improperly admitted to be read in evidence to the jury.

This deposition was taken under a rule of court in an action of ejectment brought and tried in the Court of Common Pleas of Indiana county of this state, by the plaintiff, Mr. Chew, against Joseph Barnett and others, for a part of the same land, the title to which was to be tried in this action by the agreement of the parties. At the time this deposition was taken, William Parker, the deponent, had no title or claim to any of these lands. His interest in them has arisen since that, under the will of his brother, Jeremiah Parker; and were it not for the agreement of the parties, which was entered into for the purpose of making William Parker, the deponent, a party to this action, as well as for declaring and explaining the design and effect of the judgment, which should be finally given in it, the deposition according to the rule laid down by this court in *Chess v. Chess*, 17 Serg. & Rawle, 409, ought not to have been admitted in evidence. In this agreement, however, the following clause is contained: "That the evidence, which has been taken in the ejectment depending in the county of Indiana for Jefferson county, of Benjamin Chew *against* Joseph Barnett and others, and also against Ira White, shall be admitted to be read on the trial, saving all legal exceptions, which might have been made in those actions." It has been argued by the plaintiff's counsel, that this agreement cannot be considered as extending to the admission of the party to the suit, to make testimony for himself, which would be to violate some of the first rules of evidence, which not only exclude the parties on record, but every interested person in the suit, from becoming witnesses in support of their interest on the trial of the cause. And again, that the agreement by its very terms embraces only suits then pending, but the action, in which Parker's deposition had been taken, was not then pending, *for it had been tried and determined some considerable time before the date of the agreement. [*298]

There is certainly great force in these objections. I must confess, that at the time of the trial I had great doubt as to the propriety of admitting this deposition, but upon more full deliberation, I feel satisfied, that under the agreement of the parties, and the particular circumstances connected with the suits mentioned in the agreement, it was rightly received. This agreement provides expressly for the admission of the evidence taken in the ejectments in the county of Indiana, of Benjamin Chew

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against Joseph Barnett and others, and although the agreement mentions it as a case then depending, yet it was the only ejectment that Mr. Chew ever had brought in that county against Joseph Barnett and others, and the deposition of William Parker was the only evidence taken in it; so that there was no other case between these same parties either depending or determined, but this one, to which the agreement of the parties can be applied, and no evidence taken in it, to which the agreement could have a reference, but the deposition of Parker. In the absence of all testimony going to show, that this ejectment of Benjamin Chew against Joseph Barnett and others was introduced into the agreement either by mistake or fraud, we, in order to give effect to the agreement, are compelled to consider it as one of the actions intended to be referred to by the parties; and the deposition of William Parker, as it was the only one taken in the cause, as the evidence that was referred to in connection with the cause, and provided for, to be given in evidence on the trial of this cause, unless it could have been objected to in the cause, in which it was taken, which does not appear that it could. This construction may not be treating the participle "depending," which is the word used by the parties in the agreement, according to its strict grammatical sense, as it is in the present tense, but then a grammatical construction is not to be regarded, when it would, as in the present case, render that inoperative, which was clearly intended to be otherwise.

The third and fourth reasons involve the same principle, that is, whether the deeds offered in evidence and rejected, were relevant to the issue trying, and could, as evidence, have any legitimate bearing upon the matter in controversy.

These deeds or documents contained upon their face no reference or allusion whatever to the thirty-six thousand acres of land, the title to which is the great matter in question here, nor do they appear to have any bearing or connection with any agreement between William Parker and Moore Wharton with James Wilson, or between Jeremiah Parker and Wilson, relating to these lands, or the sale of them, or price of them, nor yet to have grown out of the indebtedness of James Wilson, for and on account of the purchase of these thirty-six thousand acres. Neither was any evidence offered to show that they had any such connection or relation to the matter in controversy in this cause; [299] although it was said by the plaintiff's counsel that the *object was to prove that James Wilson had made satisfaction for the price of these thirty-six thousand acres conveyed to him by Jeremiah Parker. Thus it appears, that those deeds offered in evidence, were not shown to have any connection with, or bearing upon the cause. They were not even between the

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same parties to any of the transactions out of which this controversy has grown. Again, these deeds were given long before the purchase-money due from Wilson to the Parkers and Wharton became payable; and besides all this, it appeared, that the bonds which had been given by Wilson for the payment of the purchase-money of the thirty-six thousand acres were still in the possession of the obligees or their assignees, which could not have been the case, consistently with what was alleged, or rather suggested by the plaintiff's counsel, when they offered these deeds in evidence; for if the deeds so offered had been founded upon an accord for the satisfaction of these bonds, or the debt for which they were given, they would have probably, as certainly they ought to have been, given up to Wilson. The admission of such evidence might have had a tendency to mislead, confound, and distract the minds of the jury, but could have furnished them with no light upon the matters in issue, and was therefore properly rejected.

The fifth reason is to the charge of the court to the jury as to the effect of that part of the agreement of the 11th of September, 1794, between Parker and Wharton with Wilson, which provides for the giving of a mortgage to secure the payment of the purchase-money, either upon the lands sold, or upon other lands of equal value to be furnished by Wilson at his election. There was nothing wrong in the charge given to the jury upon this point. This court considers the charge in this particular, a true exposition of the agreement.

The sixth reason also arises out of the charge to the jury, where they were told that I thought that they would agree, that unless those persons who were interested in the land, and sold it to Wilson, consented, and most explicitly, that he should have the land clear of all claim on account of the purchase-money, it would not be just or equitable that he should have it so. This part of the charge must be considered with reference to all the documentary evidence given in the cause, on the part of the defendant, in relation to his claim upon the land sold as a security for the payment of the purchase-money; and this court is of opinion, that when the articles of the 11th of September, 1794, the deed from Jeremiah Parker to James Wilson, the mortgage from Wilson and the bonds given by him, which are recited in the mortgage to be of even date with it, to secure the payment of the purchase-money, are all examined, they will evidently appear to be links of the same chain, and must be considered component parts of the same transaction, and that everything done subsequently to the date of the articles, was done in execution and in pursuance of the articles of agreement, because there is nothing else to which these subsequent transactions can

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[*300] be referred, to render them intelligible: That this is a conclusion of law, growing out of this *documentary testimony, and hence the mortgage is to be considered as given under the provision contained in the articles for that purpose; and that the difference in the dates of the deed of conveyance of Jeremiah Parker to James Wilson, and the mortgage from Wilson, did not furnish sufficient ground for the jury to presume that the sellers of the lands to Wilson had agreed to accept of the bonds as their only security for the payment of the purchase-money from him, and to relinquish their right and claim to the mortgage, contrary to the express terms of the agreement.

The opinion of this court expressed as to the sixth reason, disposes of the seventh as being also insufficient.

There is nothing in the eighth reason, which is the last.

In answer to the attempt on the part of the plaintiff's counsel to distinguish this case from the case of *Chew v. Barnett*, 11 Serg. & Rawle, 389, the court think proper to say, that the great leading features of the two cases are the same. The circumstance of the articles of agreement of the 11th of September, 1794, being given in evidence on the trial of this cause by the defendant instead of the plaintiff, as in the case of *Chew v. Barnett* and others, can make no material difference. The effect and bearing of these articles upon the case, from their nature and tenor must be the same, whether given in evidence by the one party or the other. The principles, therefore, laid down by this court in the case of *Chew v. Barnett* and others, are strictly applicable to, and govern the present one.

The motion for a new trial is dismissed, and judgment entered upon the verdict.

ROGERS, J., and ROSS, J., dissented.

New trial refused, and judgment for the defendant on the verdict.

Cited by Counsel, 2 Wh. 413; 7 C. 417.

Cited by the Court, 8 W. 382.

[PHILADELPHIA, JANUARY 30, 1832.]

Lawall and Wife *against* Kreidler, Executor of Kreidler.

IN ERROR.

The estate of a testator is not liable for the funeral expenses of his widow.

[Lawall v. Kreidler.]

FROM the record of this case returned on a writ of error to the Court of Common Pleas of *Northampton* county, it appeared, that *Christina Kreidler, one of the plaintiffs in error, who [*301] afterwards intermarried with William H. Lawall, the other plaintiff in error, brought suit before a justice of the peace of *Northampton* county against the defendant in error, Conrad Kreidler, executor of Frederick Kreidler, deceased, to recover a sum of money alleged to have been advanced by her for the defendant's use, being the amount paid by her for the funeral expenses of Barbara Kreidler, the widow of the defendant's testator. The justice gave judgment for the plaintiff, and the defendant entered an appeal to the Common Pleas. The cause was afterwards submitted to arbitrators, who also found in favour of the plaintiff, and the defendant appealed from their award.

On the trial in the Court of Common Pleas, it was proved that Barbara Kreidler died in the house of her daughter Christina. On the morning on which she died, Christina sent to the defendant to inform him that her mother was dying. He did not come for a long time, and Christina sent for the grave-digger and clergyman. When the defendant arrived, he objected to Christina's holding the funeral, as it would be too expensive, and said he would hold it himself; he would have the victuals cooked at his house, and the funeral should be held at hers; to which Christina replied, that he should hold the funeral. To this observation he made no answer, but went away. He was afterwards applied to, to know whether he would not do something, but he made no answer. The funeral was held by Christina, who paid the expenses of it. The defendant sold the widow's goods after her death, but except one table, it did not appear what they were or for what sum they were sold.

Frederick Kreidler, by his will gave to his wife Barbara, during her natural life, his household and kitchen furniture, the use of the house in which he resided, with the garden, and the interest of two hundred pounds. He also directed his executor to keep a cow for her and to supply her yearly with a certain quantity of provisions, and as much fuel as she stood in need of.

Before her death Barbara Kreidler was in possession of a note for ninety dollars, with some interest due upon it, which she indorsed to her daughter Christina, saying, at the time that she had a great deal of trouble with her; that Conrad had threatened to sell her lot, and Christina might have the note to help herself.

The defendant's counsel demurred to the evidence given the plaintiff, who joined in the demurrer.

The jury assessed the plaintiff's damages at fifty dollars fifty-

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three cents, but the court rendered judgment on the demurrer for the defendant.

After the judgment in the Court of Common Pleas, the plaintiff below married William H. Lawall, by whom, with the said Christina, this writ of error was sued out.

The cause was argued in this court by *Hepburn* for the plaintiffs in error, and by *Brooke* for the defendant in error.

[*302] *The opinion of the court was delivered by Ross, J.—In this case there was a general demurrer to the evidence of the plaintiff. The court sustained the demurrer, and gave judgment for the defendant; in which it is now alleged, the court erred. The single and only question in this case, which is presented for our determination, is, whether the estate of a testator is liable for the funeral expenses of his widow. The counsel for the plaintiff admits that the bequest made by Frederick Kreidler, deceased, to Barbara, his widow, was in lieu of dower; and that she elected to take the same in lieu of her dower at common law. They however contend, that the annuity and other bequests to her were entirely inadequate to her support after she became old and helpless, and that she must either have suffered from want, or have become a charge upon the township, if she had not been assisted by her daughter, the plaintiff, who after suit brought, intermarried with William H. Lawall. This allegation is not justified by the evidence; for a short time previous to her death she indorsed a note to Christina, the plaintiff, for ninety dollars, with some interest due thereon; and she then told the person who wrote her name on the note, and witnessed it, that “she was willing Christina should have the note; that she had had a great deal of trouble with her; that Conrad had threatened to sell her lot, and that she might have that to help herself.” She was therefore not so destitute of the means of supporting herself, as the counsel have represented. Neither were the provisions made by the will entirely inadequate to her support, for if so, she certainly would not have been able to put out ninety dollars upon interest; and to have continued it upon interest until a short time previous to her death, when she thought proper to transfer it to Christina as much with a view of preventing Conrad from taking the lot from her, as it was to compensate her for any trouble which she may have had with her. But admitting that she was as necessitous as has been represented, even a very pauper, would the estate of the testator be liable to maintain her, and to defray the expenses of her funeral? The plaintiff contends that it would, and relies on the isolated case of *Bertie v. Ld. Chesterfield*, reported in 9

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Mod. 30, 31. In that case, it was decided by the Master of the Rolls that the estate of the husband in the hands of the devisee is liable for the funeral expenses of the testator's wife, although she lived apart from him on a separate maintenance. It was suggested in the bill, but not proved, that the plaintiff, Mr. Bertie, was requested by the late Earl of Caernarvan to see his lady buried. The Earl of Caernarvan had devised six hundred pounds per annum to Lord Chesterfield, subject to the payment of his debts. His lady had power to dispose of her separate maintenance by will; and she accordingly made a will, and constituted the plaintiff executor thereof; by which she gave away more than she had to dispose of. It was decreed, that because the plaintiff took nothing of her estate by being made executor, (for she gave away the *whole in legacies,) the husband's estate was subject by law to pay the funeral expenses of the wife. I have [*303] been unable, from the researches which I have made, to find this case reported in any other book. It certainly wants that precision, which is requisite to give a correct view of the subject. Whether the Earl of Caernarvan, or his wife died first, does not distinctly appear. If she died first, then it was a debt, which the legacy to Lord Chesterfield would be liable to pay. We are also left entirely in the dark as to the nature of the provisions made for the separate maintenance; these provisions might have had considerable influence in making the decree. At any rate the reason assigned for the making of this decree could, under no circumstances, be applicable to a case arising under the laws of this state. According to our act of assembly funeral expenses must be first paid; and according to the decisions under that act, they must be paid before legacies, &c. The fact, therefore, of a wife bequeathing more than she possessed; or of an executor taking nothing by the will, which are the grounds of the decree in the case referred to in 9 Mod. can have no weight in the determination of this question by the courts of this state.

The only provisions in our laws in reference to this subject are to be found in the 30th section of the act of 1771, (Purd. Dig. 724,) and the 6th section of the act of 1812, (Purd. Dig. 742,) and also in the 4th section of the act of 1718, (Purd. Dig. 328.) The provisions of the act of 1771, and those of the act of 1812, may be considered as similar, so far as they have any bearing upon the present question. They provide for cases, where husbands who have estates which should contribute to the maintenance of their wives or children, desert them and leave them a charge upon the city, borough, or township. In such cases, authority is given to the overseers of the poor, after

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having obtained a warrant or order from two magistrates, to seize so much of the goods and chattels, and also to receive so much of the annual rents and profits of the lands and tenements of such husband, &c., as such two magistrates shall direct for the maintenance of such wife, &c., which order being confirmed at the next court of quarter sessions, it shall be lawful for the justices of the said court to make an order for the overseers to dispose of so much of the goods and chattels as the said justices shall think necessary; and also to receive so much of the rents and profits of the lands, &c., as shall be ordered by the said justices. Whether the sequestration of the husband's goods and chattels, and the rents and profits of his real estate so authorized to be made, would continue longer than the husband's life, is a question not presented by the case under consideration for our adjudication. I express no opinion about it. There is, indeed, nothing in these acts, which can render the estate of the husband after his decease, liable to pay the funeral expenses of his widow. The act of 1718 has reference only to mariners and sea-faring men, remaining away beyond a limited time, and has no relevancy to the case under consideration.

[*304] *I have been unable to discover any provision in any of our acts of assembly authorizing the funeral expenses of the widow to be defrayed out of the estate of the husband, or indeed any liability of the husband's estate for her maintenance, unless the sequestration of the rents and profits of his estate, made in pursuance of the acts just cited, be considered to be and continue a lien. It is difficult to see how any such law could be made consistently with the exercise of the husband's reasonable disposition of his estate. Suppose a woman has had three husbands, who have all died, leaving her a widow; of the three husbands, whose estate would be subject to the payment of the widow's funeral expenses? If it be said, that the estate of the last husband is liable, I answer, that he died insolvent. If it be said, that the estate of the second husband must be subjected to the payment, I answer that she was the sole executrix and wasted the whole of it before her last marriage. But if it be said, that the estate of the first husband is liable, I answer, that he left her a valuable property, and that she has extravagantly run through the whole of it with the assistance of her other husbands. Certainly there would be no equity in making the estate of the first husband in the hands of the devisee or *bona fide* purchasers liable for the payment of that which she had ample means left her to defray. If she has, by self-indulgence or improvident management, become a pauper, she must be supported and buried as all other paupers are, who have no children able to support and bury

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them. But if she has children able to maintain and bury her, the laws of the state will compel them to do so. At common law, there was no support provided for the poor. It was an ecclesiastical regulation; one-fourth of the tithes being applied to that purpose. As the system of tithes never existed here, this regulation could have no application in this state.

At the time of the decree in *Bertie v. Lord Chesterfield*, a woman living apart from her husband on a separate maintenance and contracting debts, could not be compelled to pay those debts out of her separate maintenance; the provision for her separate maintenance was exempted from their payment. But the law has since undergone a change on this subject; and her debts have been decreed to be paid out of her separate maintenance. It has even been doubted whether her separate maintenance is not liable for her funeral expenses. See Mr. Jacob's Note to 2 Ross. on Leg. 245, London Edit. of 1826.

There is no error in the judgment of the court below, and it must be affirmed.

Judgment affirmed.

Cited by the Court, 6. Wr. 302.

*[PHILADELPHIA, FEBRUARY 2, 1832.]

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Altemus *against* Ely.

IN ERROR.

An apprentice is not within the meaning of the act of the 14th of February, 1729-30, supplementary to the "Act for the preventing clandestine marriages," which prohibits clergymen and others from joining in marriage "indented servants," without the consent of their masters or mistresses.

ERROR to the District Court for the city and county of *Philadelphia*.

The plaintiff in error was the plaintiff below, and brought this suit as master of an apprentice, against the defendant, a clergyman, to recover the penalty of fifty pounds for marrying the apprentice without his master's consent. This penalty was claimed by the plaintiff, for an alleged violation of the act of assembly, passed the 14th of February, 1729-30, entitled, "A supplement to the act, entitled, an act for the preventing clandestine marriages." The only question raised by the record was, whether an apprentice be embraced by the words, "indented servant," whom, by that act, justices of the peace. clergymen,

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ministers, or other persons, are prohibited from joining in marriage, without the consent of their masters or mistresses.

The court below gave judgment for the defendant, in which error was here assigned.

P. A. Browne for the plaintiff in error.

Chester and Chauncey for the defendant in error.

The opinion of the court was delivered by

KENNEDY, J.—In order to determine the question raised upon this record correctly, it may be well to refer to the words of the original act as well as the supplement. The original act, (1 Sm. L. 21,) among other things, declares, that “if any servant or servants shall procure themselves to be married, without consent of his or her master or mistress, such servant or servants shall, for such their offence, each of them serve their respective masters or mistresses one whole year, after the time of their servitude by indenture or engagement is expired. And if any person, being free, shall marry with a servant as aforesaid, he or she so marrying, shall pay to the master or mistress of the servant, if a man, twelve pounds, and if a woman, six pounds, or one year’s service; and the servant, so being married, shall abide with his or her master or mistress according to the indenture or agreement, and one year after as aforesaid.” The preamble to the supplement, (1 Sm. L. 180,) recites, that “whereas the good intention of an act of assembly of this province, entitled [*306] an act for preventing clandestine marriages, hath been very much eluded, by reason that no proper penalty is, by the said law, imposed upon the justice of the peace or other persons marrying or joining in marriage any persons, contrary to the intent and meaning of the said act: For remedying whereof, be it enacted, that no justice of the peace shall subscribe his name to the publication of any marriage within this province, intended to be had between any persons whatsoever, unless one of the persons at least lives in the county, where such justice dwells, and unless such justice shall likewise have first produced to him a certificate of the consent of the parent or parents, guardian or guardians, master or mistress of the persons whose names or banns are to be so published, if either of the parties be under the age of twenty-one years, or under the tuition of their parents, or be indentured servants,” &c. The second section then imposes a forfeiture of fifty pounds upon every justice of the peace, clergyman, minister, or other person, who shall join in marriage contrary to the provisions of these acts, “to be recovered in any court of record within this commonwealth, by bill, plaint, or in-

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formation by the person or persons grieved, if they shall sue for the same."

It has been urged by the counsel for the plaintiff in error, that the term "servant" in legal acceptation at least embraces an apprentice: That this appears not only from Jacob's Law Dictionary, but from Viner, Blackstone, and others, who have classed apprentices with servants; have treated of them as a species of servants and laid down the law in respect to them under the title of "master and servant." This argument, if it prove anything, proves more than the plaintiff claims, because it is admitted on his part that hirelings are not embraced within either of the acts, yet nothing is more certain than that they are embraced within the generic term "servant" in its legal signification. But, I think it apparent from the phraseology of these acts, that it was not the intention of the legislature to employ the term "servant" in its legal generic sense, and more especially in the supplementary act, which is the one that imposes the penalty. The original act declares, that if servants shall procure themselves to be married without the consent of their masters or mistresses, they shall for such offence "serve their respective masters or mistresses one whole year after the time of their servitude by indenture or engagement is expired." The terms employed in the supplementary act are "indented servants" which are more definite and perhaps more restrictive than the phraseology used in the original act. The supplement is in positive terms confined to the cases of indented servants, and I will not say but what this ought to be considered as explanatory of the description of servants intended to be embraced by the first act, and that neither was intended to be extended to others than indented servants. For the preamble to the supplement would seem to indicate that its design was to provide a suitable punishment for those who should join such servants *in marriage, as were prohibited from marrying by the original [*307] act under a penalty of having their term of service extended one year beyond the time of their indenture or engagement. These acts, although it may be said, that in one point of view they are remedial, yet it must be admitted, I think, they are highly penal, for by the provisions of the first act, the servant, who offends against it, is made to serve his master or mistress one whole additional year, whether the master or mistress shall have sustained damage or not by the servant's marrying without consent. And by the supplementary act, the person, who joins an indented servant in marriage, is made to pay fifty pounds to the party grieved, that is, the master or mistress, whether he or she shall have sustained any actual damage by it or not. I am therefore inclined to believe that in the construction of these

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acts, we are bound to confine ourselves to what shall appear to have been clearly and manifestly the intention of the legislature in passing them; and that this intention must be collected from the various parts of these acts taken together, and the terms used therein, as also from other acts passed about the same time and subsequently, in relation to servants and apprentices, and not from our own notions of what may or ought to be considered as existing evils at the present day on this subject, and therefore proper to be considered as coming within the purview of these acts.

I think it may be safely affirmed, that at no period in Pennsylvania, has the term "servant" in common parlance been extended to an apprentice. An apprentice has ever been considered as having and maintaining a higher stand or grade in society than him, who is commonly denominated a servant. This distinction too will appear to have been taken and to have rested on the mind of our legislative body, as often as its attention has been turned to servants and apprentices, and it has thought proper to legislate upon the subject. A reference to these acts will furnish the most abundant proof that whenever the legislature intended to pass or make any provision, which was intended to embrace apprentices, that they have uniformly named them specifically; and no instance, I think, can be found in any act of assembly where the two terms are used as synonymous.

In the year 1700, (1 Sm. L. 10,) a little before the passage of the first act involved in this case, an act entitled, "An act for the better regulation of servants in this province and territories," was passed. The term "servants" without any epithet of qualification or restriction, is used in this act throughout, yet it has never been supposed, that apprentices were embraced within its provisions; certainly in practice they have not. The third section gives freedom dues such as are therein specified, to those servants who shall have served faithfully for four or more years. Among the articles specified as freedom dues are one new axe, one grubbing hoe, and one weeding hoe, things that would be of little or no use whatever in almost every trade, art, or mystery that is learned in the character of an apprentice. The fourth section imposes a penalty or five days' service upon

[*308] **"any servant,"* who shall absent himself from his master's service, without his consent, for every day that the servant shall so absent himself, and such further satisfaction as the county court shall see meet, who are also to order the additional time to be served. Sons of the most respectable citizens within this state, as well during the time it was a province, as since, have been bound out to learn some art, mystery, trade, or occupation, such as that of husbandman, merchant, or some of

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the mechanic arts. Indeed, it is as likely as not that some of the sons of these very legislators themselves, who made some of these laws, were so bound out as apprentices; and can it be imagined, that they intended such regulations for apprentices? Most certain it is that in practice they have never been so applied, which is at least strong, if not conclusive evidence of the original design of these acts. By a supplement to this act passed as late as the 9th of March, 1771, (1 Sm. L. 321,) a suramary remedy is provided to enforce some of the provisions contained in the original act without the least alteration of phraseology showing, that apprentices or their masters were not intended to be embraced.

That the term "servants" as used in these acts, was not intended to embrace apprentices, will appear still more clearly, if possible, from acts passed, providing for them *eo nomine*: For by reference to these acts, we shall find, that apprentices have not escaped the attention of the legislature, but have been provided for expressly by name, and that some of the provisions in respect to apprentices are substantially, if not *verbatim*, the same with some of these which were in being at the time, for servants, which would have been altogether unnecessary, if they had been previously embraced under the term and idea of their being "servants." By an act passed March 27th, 1713, (1 Sm. L. 81,) Orphans' courts were established and by the seventh section of the act, (page 84,) were authorized upon the application of the executors or administrators of persons dying and leaving minor children, without regard to the value or amount of the estate, which was left or descended to such children, or upon the application of the guardians or tutors of orphan minor children, "to order and direct the binding or putting out of them apprentices to trades, husbandry, or other employment, as shall be thought fit," subject, however, to some restrictions mentioned in the 12th section of the act, which go to prove the great care and attention that the legislature had for apprentices above servants. By this section they were not to be bound to persons whose religious persuasion was different from what the parents of such orphan or minor professed at the time of their decease, or against the minor's own mind or inclination, so far as he or she had discretion and capacity to express or signify the same: or to persons that were not of good repute, so as others of good credit and of the same persuasion, might or could be had. But very different was the law as to servants, who at this time were liable to serve anybody, and to be transferred from hand to hand, so that they were not disposed of to persons residing out of the state, without their consent, or any regard paid to the religious profession or even the moral character

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of the master. On the 4th of March, 1763, "An act for the regulation of apprentices within this province," was passed, which was afterwards on the 29th of September, 1770, repealed by an act of that date, entitled "An act for the regulation of apprentices within this province," (1 Sm. L. 309.) The preamble to this act recites, that "Whereas great mischiefs and losses have been sustained by the masters or mistresses of apprentices within this province for want of some law to regulate their conduct and behaviour during their apprenticeships (not servitudes) to prevent their absenting themselves from their said masters' or mistresses' service without leave, to punish them for any disorderly, immoral behaviour, and to make the covenants between them mutually obligatory; For remedy whereof, &c." The state of things referred to and recited in this preamble must be considered as true, and if so, the act of 1700 for the better regulation of servants in this province and territories, could not be considered as embracing apprentices. If this last act does not, it is equally clear, that the acts of 1701 and 1729-30, already referred to on the subject of marrying servants, cannot be extended to apprentices. But among other things, it is stated in the preamble of this act of the 29th of September, 1770, for the regulation of apprentices, that there was no law to prevent their absenting themselves from their masters' or mistresses' service without leave. Now it is evident, that this was not true, if the term "servants" as used in our acts of assembly, and used too without any qualifying or restrictive adjunct or phrase, be sufficient, and does include apprentices, because the very words of the fourth section of the act of 1770, (1 Sm. L. 10,) for the better regulation of servants in this province, are "and for the prevention of servants quitting their masters' service, be it enacted, That if any servant shall absent himself or herself from the service of their master or owner for the space of one day or more without leave first obtained for the same, every such servant shall, for such day's absence, be obliged to serve five days after the expiration of his or her time, &c." And in addition to this, a fee of ten shillings was allowed to any one, who shall take up or apprehend a runaway servant. Again, to establish what I have before said, I refer to the sixth section of the act of 1700 for the regulation of servants, and the 4th section of the act of 1770, for the regulation of apprentices, imposing a penalty on such as conceal, entertain, or harbour them, and by comparing these sections, it will be seen that the latter is substantially the same with the former, only that the term servant is used in the one and apprentice in the other, a thing altogether unnecessary, if the term "servants" had been understood to embrace and include apprentices in our legislative enactments. But

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while the legislature thought there was no difference between the person, who should harbour and conceal a servant, and him, who should harbour and conceal an apprentice, having made the punishment the same, it is obvious, that they have made a great distinction between the punishment *to be inflicted upon [*310] an absconding servant, and that which is to be inflicted upon an absconding apprentice. In the case of the first, they have made him liable to serve five days for every one lost by his absenting himself without his master's leave, and to pay such damages in further satisfaction to his master or mistress as the court shall think proper to award, but in the case of the apprentice, the court can only imprison and confine him to hard labour in case he should seem to be refractory and unwilling to return to a faithful discharge of his duty. Also another very important distinction is made in favour of the apprentice by this act of the legislature for regulating apprentices, that has never been extended to servants. The court of quarter sessions of the proper county is thereby authorized to discharge an apprentice from his apprenticeship and from all obligation contained in the indenture upon his part, if the court shall see, that the master or mistress has misused, abused, or evilly treated, or shall not have performed his or her duty towards the apprentice. From a fair exposition of all these acts of assembly on this subject, I feel satisfied, that apprentices were not intended to be embraced under the term "servants," which is used in the acts of 1700 and 1729-1730, as contended for by the plaintiff's counsel.

So far as we have any judicial lights upon this subject in this state, it appears to me, that they are rather against what the plaintiff's counsel contends for in this case. The *Commonwealth v. Keppele*, 1 Yeates, 233, determines a servant in Pennsylvania to be a very different person from an apprentice, and denies all power to a guardian to bind out his ward as a servant, or to a parent to transfer a right to the service of his child, who is a minor, to pay the father's debt: yet for the purpose of making the ward or the child an apprentice, such authority does exist. In *Zieber v. Boos*, 2 Yeates, 321, the point, which is made in this case, was not decided. The court merely adjudged that the minor, who was married by the defendant, not being either the servant, or the apprentice, or the child of the plaintiff, he could not maintain the action. But the decision of the Supreme Court of this state in the case of *Norris v. Pilmore*, 1 Yeates, 405, establishes the right of the parent to recover the penalty of fifty pounds for marrying her minor son, who was at the time an apprentice to another person. Again, it has been decided in the case of *Hill v. Williams*, 14 Serg. & Rawle's Rep. 287, that but one penalty can be recovered under this act. These two cases

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came pretty near, if not quite, to deciding the present case in favour of the defendant. It is reasonable and certainly very expedient, that the person who is entitled to demand and receive the penalty should be certain, and that the act should receive such a construction as to render it certain who he is. If then it be the point according to the decision in *Norris v. Pilmore*, and but one penalty can be recovered for the marriage of the same person, the necessary conclusion is, that this suit was not maintainable. But to say that the master of an apprentice [*311] should recover the penalty, would be to *decide that a justice of the peace, clergyman, or other person, may with impunity marry the minor child of a father or mother, without their consent, if such minor be an apprentice at the time, and his master or mistress give consent. I cannot persuade myself, that the good sense and feeling of the legislature of this state could have intended to substitute the consent of the master or mistress of a minor apprentice for that of the parent in a matter which not only concerned the welfare and happiness of the minor himself, but the well being and happiness of his parents, and which was to endure, not merely during the apprenticeship, but throughout life. So far as we have any judicial authority bearing upon the question in this case, I think, it is in favour of the defendant : and I would further observe, that there does not seem to be any strong reason for extending the provisions of these acts against clandestine marriages to apprentices, and giving to their masters a right to recover the penalties as the party aggrieved, because they always have it in their power to protect and secure themselves against loss or damage, or loss that may be sustained by their apprentices getting married without their consent, in the contract creating the apprenticeship. They can always have the covenant of the apprentice and the parent as an indemnity if required ; and where there is no parent, they can, often, in addition to the covenant of the apprentice himself, obtain that of the guardian, or some friend as a security against future damage arising from such a cause. Indeed, it does not appear often to be the occasion of actual injury or loss to the masters or mistresses of apprentices, or we should hear much more of it than we do.

HUSTON, J., dissented.

Judgment affirmed.

Cited by Counsel, 1 Wh. 114; 1 Barr, 434.



*[PHILADELPHIA, FEBRUARY 2, 1832.]

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APPEAL.

The execution of a disputed specialty is fully proved by the production of the subscribing witnesses, who recognise their signatures, and remember the transaction, though neither remembers any formal delivery, and the positive evidence of another person present at the time. A failure of memory, on the part of the subscribers, is sufficient ground for introducing the other testimony.

M. a native of P. after an absence of seventeen years in S. A. returned to the U. S. with no purpose of resuming his foreign residence. He resided with his father; styled himself in an instrument as of P. and made a new contract for another foreign residence in A. for a limited time. Held, that the domicile of origin was revived; and that the new absence for a special and temporary purpose, and without a view of indefinite residence, effected no change.

If a foreigner asks for a dividend of a decedent's estate, he must take it subject to the priorities, established by the law of the forum. Qu. If the assets had been taken away from the foreigner's own country by an irregular removal

THIS was an appeal from the decree of the Orphans' Court of the city and county of *Philadelphia*, rendered on the 18th of January, 1828.

William G. Miller, of Philadelphia, left the United States, about the year 1805, being then twenty-two years of age, and did not return until 1822. In the meanwhile he was engaged in commercial enterprises, and contracted large debts as a member of a mercantile house in Buenos Ayres and Monte Video. His residence at Buenos Ayres was about eight years, during part of which time he kept house. He lived three or four years at Monte Video, and exercised there the functions of Vice Consul of the United States. His last articles of partnership were for three years, with notice to dissolve. Thirteen months of that term were still to elapse, when Miller came to Philadelphia in 1822, for the purpose of dissolving certain foreign attachments, and, if necessary, of taking the benefit of the insolvent laws. He was also employed here in soliciting consignments for the South American house; but he gave the partners notice of his resolution to quit the firm at the expiration of the time stipulated, and expressed his intention of residing here and engaging in business. Miller lived at his father's house, except the time spent in journeys to the eastward and to Washington. He was not known to have voted during this period, or paid a tax, or served upon a jury.

In the summer of 1824, Miller entered into a negotiation

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with Borie and Laguerenne on the subject of a partnership to be formed for carrying on a commission business in Alvarado in Mexico. A partnership was agreed upon to last five years, [*313] with liberty for either *party to dissolve it at the end of three years. In the articles Miller styled himself "of Philadelphia." He expressed great reluctance to go on account of the climate and the bad state of his health; and he was anxious to limit the necessary time of his stay. In four or five months after his arrival at Alvarado, Miller died. He kept house during his residence at that port.

Letters of administration were taken out to the estate of the deceased, by his brother, Clements S. Miller, in Philadelphia. The funds, that came to his hands and were in court for distribution, arose from the profits of the house at Alvarado after payment of all demands there. They were transmitted by the surviving partners upon a settlement after the intestate's death. The whole balance was two thousand eight hundred and ninety-five dollars, forty-four cents; it was claimed by simple contract creditors domiciliated in foreign countries, whose demands amounted to one hundred and thirty-nine thousand six hundred and fifteen dollars, sixty-four cents, and by the assignees of Abraham Piesch, who contended for a preference as specialty creditors to the amount of ten thousand one hundred and twenty-one dollars, under the following circumstances:

When Miller had completed his arrangement with Borie and Laguerenne, he became anxious to effect a settlement of a debt due to the assignees of Abraham Piesch, in order to prevent impediments to his business. He obtained a letter of license, for which he gave a sealed acknowledgment of the debt. The sealing of this instrument was not stated in its body; the party declared himself only to have "set his hand." The subscribing witnesses swore to their own signatures, but did not recollect any signing, sealing, or delivery by the party. They were unacquainted with Miller's person and handwriting. John Greiner, one of Piesch's assignees, having released his commissions, was thereupon sworn. He deposed, that he had himself affixed the seal by agreement with Mr. Miller, and that the instrument was afterwards acknowledged in the presence of the subscribing witnesses.

The Orphans' Court, on the 18th of January, 1828, decreed the instrument to be a specialty; and that the entire assets, being distributable by our laws, should be paid over to the assignees of Piesch under the fourteenth section of the act of 19th April, 1794.

The appeal of the simple contract creditors from this decree was argued upon the following exceptions:—

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1. That the said court erred in decreeing the instrument, produced by the assignees of Abraham Piesch, to be a specialty : no sufficient evidence of the same having been laid before the court.

2. That the said court erred in decreeing the said assets to be distributed according to the laws of Pennsylvania : the said William G. Miller not having been domiciliated in this state at the time of his decease.

3. That the said court erred in decreeing the said assets to be *distributed according to the laws of Pennsylvania, in-asmuch as the said intestate died in Mexico, and out of [*314] the territory of this state.

Laussat, for the appellants :— I. The execution of the instrument as a specialty was not shown. The party producing a specialty, is bound to prove, 1, the identity of the person executing; 2, sealing; 3, delivery : and the subscribing witnesses are to substantiate the transaction, for they were chosen by the parties for that special purpose. Here the subscribing witnesses fail wholly in proving Miller's identity, and give inadequate testimony on the subject of sealing and delivery.

As to the admission of Greiner to supply their deficiencies, it was erroneous and improper, because as no one of the special exceptions, stated in the books, was presented to the court, the general rule applied, which confines evidence to the subscribing witnesses. (U. S. Bank v. Dandridge, 12 Wheat. 91 ; Starkie's Ev. Part 2, 332 ; Leshner's Lessee v. Levan, 2 Dall. 96 ; Sigfried v. Levan, 6 Serg. & Rawle, 311, 12 ; 1 Phill. Ev. 419 to 421.) There is then no direct evidence to establish this alleged specialty ; and it goes, therefore, to the court as it would to a jury, merely upon presumptions, which are entitled to no favour against that equality among creditors, which is the only true equity. Upon *non est factum*, the courts go far to support an instrument, for justice requires it ; but here the situation of things is reversed, and every consideration pleads in favour of the appellants.

II. The act of 1794, § 1, 14, (3 Sm. L. 143,) establishes its preferences only where the decedent was within the state at the time of his or her decease. Giving this expression the utmost latitude, it cannot be made to embrace more than those who had at least their domicils here. The domicile of William G. Miller is therefore an important subject of inquiry.

Domicil is a habitation fixed in a particular place, without a present intention of removal. (10 Mass. Rep, 488 ; Case of the Venus, 8 Cranch, 278.) It is compounded of habitation and intention. Every man's first domicile is the *domicilium originis*,

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his place of birth ; and this adheres to him, until another is acquired by his own act. Miller's first domicile was therefore in Philadelphia, and it so continued until divested by the unlimited residence at Monte Video. His return to Philadelphia was only for special purposes ; he did no act, exhibiting any fixed intention of residence, but on the contrary, he very early accepted a commercial proposition, which involved a new absence from the country, in Alvarado. The most that can be conceded is, that Miller had a future intention to resume his domicile here, not that it was actually so resumed. It was an ambulatory intention uncoupled with habitation. (Bruce v. Bruce, 2 Bos. & P. 230, note.) Whether he acquired a new domicile at Alvarado, or continued to preserve the domicile at Monte Video, is indifferent to the present argument. Either position would equally show error in the decree of the court below directing distribution by our [*315] state statutes. He kept *house in Alvarado, which constituted habitation, and there was no settled limit to his stay : besides where a man dies, there is *prima facie* his domicile. (2 Bos. & P. 230, note.)

III. But the act of 1794, § 14, extends only to persons dying within the state, and is a legislative recognition and extension of the principle, that "*mobilis personam sequuntur, immobilia situm.*" Domicil is therefore, unimportant ; and as personalty can have no *situs*, but is considered to accompany the person of its owner, the distribution is thus drawn to the place of the decease. In our case, the adoption of the law of the present *situs* would be particularly inequitable ; the property has been drawn away from Alvarado, and brought here by administration, when it is understood, that the law of the former country gives no preference to specialties. If any *situs* is to govern, it ought to be that in which the property was first found ; and this court may decree distribution according to the law of such foreign country. (Harvey v. Richards, 1 Mason, 411.)

Miller, for the appellees :—The subscribing witnesses have proved enough to sustain the instrument as a specialty. (Pigott v. Holloway, 1 Binn. 436 ; Long v. Ramsay, 1 Serg. & Rawle, 72.) And even if they had not, the testimony of Greiner was admissible, because the subscribing witnesses, when produced, were unable to declare the truth. (Taylor v. Meekly, 4 Yeates, 79 ; Lowe v. Joliffe, 1 Bl. Rep. 365 ; Ley v. Ballard, 3 Esp. 173, note ; Grellier v. Neal, Peake's N. P. Rep. 198 ; 1 Phill. 363, 419, 420 ; 1 Stark. 335–6.) As to the solemnity of this instrument, it comes within the rule of Taylor v. Glaser, (2 Serg. & Rawle, 504.)

Domicil depends upon the intention of the party to make a

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permanent residence. (2 Kent's Comm. 348.) The object of all rules is to supply the want of explicit declarations. (*Guier v. O'Daniel*, 1 Binn. 352, note; *Bruce v. Bruce*, 2 Bos. & P. 229, note; *Somerville v. Somerville*, 5 Ves. Jr. 787.) In Miller's commission as consul, he is styled "of Pennsylvania;" and in his articles of partnership with the house at Alvarado, he is said to be "of Philadelphia." Domicil is defined to be "a settlement in a particular place with the intention of always staying there." (Denisart, tit. Domicile, 1, 7, 18, 19; 2 Domat. p. 486, b. 1, tit. 16, § 3, p. 5; Pothier, *Costumes d'Orleans*, c. 1, n. 8, 9; Voet, *Pandect*, lib. 5, tit. 1, 92, 97; *Monroe v. Douglass*, 5 Madd. Ch. R. 379.) The *domicilium originis* may be changed by certain acts of the party: (Henry on Foreign Law, App'x, 196, citing the opinion of Grotius,) but upon the abandonment of the acquired domicil, that of origin reverts; and so when the acquired domicil is doubtful. (Henry citing Grotius, *Ib.* 196.) The domicil of origin is supposed to be every man's favourite, when he returns to it, slight grounds will restore him to it; (5 Rob. Adm. R. 99; *Case of the Anne Green*, 1 Gallis, 274, 284,) while the strongest are required to establish a foreign domicil. These principles apply to the circumstances attending Miller's return to Philadelphia, and fully restore him to his domicil of origin.

*It is very doubtful, indeed, whether that domicil was ever changed. There is a great difference between a [*316] removal from one place to another in the same country, and a removal to a foreign country. A person residing in a place only for the purposes of trade without keeping a house, does not change his domicil. (Henry, p. 200; *Cheyne's Case*, note to 5 Madd. 379; *Duchess of Kingston's Case*, 1 Collect. Jurid. 240; *Thornton's Case*, 2 Addams, p. 6.) As to Miller's residence at Alvarado, it was fixed not to exceed five years, and therefore could give no domicil. (*Somerville v. Somerville*, 5 Ves. 781.)

This is the case of an American dead in Mexico, whose funds not being required by creditors there, are remitted to the place of his birth to a person legally authorized to receive them. The laws of Mexico have already refused the task of distribution: the assets are surrendered to our law, and every court ought to assert its own jurisprudence in preference to that of other countries. The business of administration here is to pay debts, as well as collect assets: (*Select Men of Boston v. Boylston*, 4 Mass. Rep. 318, 324,) and these payments must be according to our own established preferences, (*Richards v. Dutch*, 8 Mass. Rep. 506; *Dawes v. Boylston*, 9 Mass. Rep. 337; *Stephens v. Gaylord*, 11 Mass. Rep. 255; *Dawes v. Head*, 3 Pick. 128; 2 Kent's Comm. 348,) for the right of priority depends upon the

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place of administration. (Harrison v. Sterry, 5 Cranch, 299; Smith v. Union Bank, 5 Peter's Rep. 518.) That comity, which gives effect to foreign laws, is not to be admitted against the fundamental institutions of a country. Desesbats v. Berquie 1 Binn. 344.

C. J. Ingersoll, in reply :—This is a court of equity, sitting upon an appeal from a court of equity.

1. As to the alleged specialty, it must be borne in mind, that the court, wherever they can, are to create equitable assets, in order to produce equality of distribution. (Moses v. Murgatroyd, 1 John. C. R. 130.) In this case the property was situated in a country making no preferences, when the defendant took out administration upon nothing, and paid a commission of fifteen per centum out of the estate, for drawing the funds within the reach of our law. The want of equity in the distinction between specialties and simple contracts is acknowledged. (Humphreys on Real Prop. 264, 334.) At all events, the superiority of a deed arises from its solemnity and deliberation, and not from mere manipulation. (Plowd. 308; Fell on Guar. 2.) Miller appears not to have known the value of a deed, and acted without deliberation.

It is also a most valuable and important rule, that where there are subscribing witnesses, they alone should be called, except in specified exceptions. (U. S. Bank v. Dandridge, 12 Wheat. 91; Sigfried v. Levan, 6 Serg. & Rawle, 311; Steel v. Tuttle, 15 Serg. & Rawle, 210; Cowden v. Reynolds, 12 Serg. & Rawle, [*317] 283; Chess v. Chess, *1 Penn. Rep. 43.) The mere circumstance of forgetfulness in the subscribing witnesses is no reason for introducing other testimony. (Appleton v. Bond, 18 Eng. Com. Law, 406; Pytt v. Griffith, 17 Eng. Com. Law, 495; Taylor v. Meekly, 4 Yeates, 79,) went upon the distinct ground, that the obligor and the subscribing witnesses were not present together. If in this case evidence is confined to the subscribing witnesses, the specialty is not established, and the whole becomes equitable assets to be distributed *pro rata*.

2. As to the law of the distribution, movables must be guided by the law of the person, immovables by the law of the place. There can be no doubt of Miller's domicile at Monte Video. But taking our own act of assembly as the law, it wholly fails the appellee. In the first and fourteenth sections, which confer the power to grant letters of administration, and create the rule of preferences, the only cases contemplated are those of persons dying within the commonwealth. The court will not strain the law to create inequality among creditors.

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The funds here stand before the court as if they were at Alvarado, because they were improperly and unnecessarily brought thence by the administrator. They are, therefore, to be distributed according to equity, because we have no law, which provides for preferences in such funds. *Harvey v. Richards*, 1 Mason, 408; *Milne v. Moreton*, 6 Binn. 353; *Topham v. Chapman*, 1 Const. Rep. S. C. 292; *Holmes v. Remsen*, 20 Johns. Rep. 265; *Dawes v. Head*, 3 Pick. 128, are all either cases of foreign attachments, or of funds regularly and properly brought within the court's jurisdiction.

The opinion of the court was delivered by

GIBSON, C. J.—The execution of the disputed specialty is established by plenary proof. Did it stand on the testimony of but the subscribing witnesses, it would still be sufficiently made out. Both recognise their signatures, and both remember the transaction; but neither remembers the fact of a formal delivery. Nothing is clearer, however, than that a formal delivery is not indispensable. The leaving of a deed on the table for the grantee to take it away, has been held sufficient. Here the instrument is proved by one of the subscribing witnesses, to have been laid on the counter; which, in connection with the fact that it is produced by the party who claims under it, is enough in all reason to warrant a presumption of its delivery; and this on the ground of all presumptions—the usual course of such transactions. In a vast majority of cases, the deed is merely left for the grantee to take it away, and where it is produced by him, the law, in the absence of proof to the contrary, infers a delivery, for the reason, that in the absence of countervailing proof, it presumes against fraud and in favour of innocence. So strong is this presumption, that in the case of a second marriage within a year after the husband had left the country, it has been allowed to prevail over the usual presumption of continuance in life. *Starkie's Ev. Pt. IV. 1248.* *It is [*318] therefore natural and reasonable to presume, that the grantee producing, as he does here, an instrument, which is proved to have been signed, sealed, and left on the counter with no view, that appears, to a postponement of the delivery, obtained the possession of it with the assent of the grantor rather than surreptitiously. It is by force of the same presumption, that proof of the handwriting of subscribing witnesses, who are dead or cannot be had, is *prima facie* evidence of execution. And such presumption accords not only with the current of such transactions, but with the recollection, as far as it goes, of the subscribing witnesses here, both of whom say, in effect, that unless the deed had been delivered, they would not have sub-

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scribed it as witnesses of the fact. Of what effect then is it, that the parties have omitted the usual recital of having affixed the seal? That recital is by no means essential to the validity of a deed, nor does it bear even remotely on the disputed fact of delivery; and as evidence of intention, it is certainly less operative than the customary memorandum of the execution subscribed by the witnesses, to which any recital or declaration of the parties themselves is inferior, just as proof of their handwriting is inferior. But in addition to the testimony of the subscribing witnesses, we have that of one of the assignees, having released any beneficial interest which he might be supposed to have in the trust, who proves the admission of the assignor at the time of sealing, that the instrument was then his deed, of which delivery was certainly a constituent part. The objection to the competency of this witness on the alleged ground, that none but a subscribing witness, where there is one, can be heard, is destitute of the shadow of an argument. The testimony of the subscribing witnesses, where it is attainable, must be had in the first instance, as it has been here; but the law is not so unreasonable as to declare, that the grantee must lose his right wherever they have lost their memory. The title to priority in the case before us, then, depends not on the proof of the instrument, but on the solution of a question, whether administration is to be made according to the law of the domicile or of the *situs rei* at the time of the intestate's death; and that involves a preliminary inquiry as to the true place of his domicile.

The facts are, that being a native of Philadelphia, and having been absent from the United States for seventeen years, he returned on the business of a commercial house at Buenos Ayres and Monte Video, of which he was a partner, but with no purpose of resuming his foreign residence. He resided with his father's family here for two years, during which his connection with the house in South America, was dissolved by efflux of time, and a partnership formed between him and other persons, for the establishment of a house at Alvarado in Mexico. In consequence of the apprehended insalubrity of the climate, he manifested in the course of the negotiation, that led to this arrangement, an insuperable aversion to being bound for more than two years, and the articles of co-partnership, in which, it is worthy of remark, he was designated as being of Philadelphia, [319] were *framed accordingly; and though he did not speak particularly of returning, he expressed a determination not to go abroad again after that time. It satisfactorily appears, therefore, that whatever was the character of his residence in South America, his domicile there, if he had acquired one, was relinquished at his return to Philadelphia; and it will not be

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disputed, that his domicile of origin, which was at most but suspended, was instantly revived by his resumption of the character of an American citizen—even before the dissolution of his connection with the foreign house. For an acquired character depending, as it does, not on the existence of commercial relations, but actual residence without a present purpose of terminating or abridging it, is abandoned for every purpose of legal effect, the instant a step is taken to abandon the country. It is clear, then, that when the intestate returned to Philadelphia with a view to a residence of indefinite duration, he regained his original domicile; and it is just as clear he did not part with it again by going to Mexico. That he went there for a special and temporary purpose, and without a view to make it a place of indefinite residence, is an indisputable result of the evidence. We have, then, the case of an administrator, who claims to administer, according to the law of the domicile, assets transmitted to him by a surviving partner of the intestate, and among creditors, who were not resident, at the time of the death, in the country where the assets were.

The ground on which the assets are to be collected by the authority, and administered according to the law of the country, in which they happen to be at the decedent's death, is the claim which its citizens have to the protection and assistance of the government in the prosecution of their rights. This protective principle has never been relaxed by the American courts; and was particularly maintained by this court in *Mothland v. Wireman*, at the last term at Chambersburg. But when the purposes of protection and assistance have been answered, or there are in fact no resident creditors to be protected, it seems from the case of *Dawes v. Head*, (3 Pickering, 128,) that the proper course is to transmit the assets to the administrator at the place of the domicile for further administration among the other creditors and those entitled to the succession. Perhaps a more regular course than the one pursued in the case at bar, would have been to obtain administration of the assets in Mexico, for the purpose of transmitting them to the administrator here. If, however, there were in fact no Mexican creditors, as is probable from the very nature of the case, the joint debts being payable before the intestate's interest could be separated from the partnership, the necessity of an ancillary administration for purposes of mere transmission, would not be so imperative. The question, however, is not whether the administrator shall be compelled to account for these assets, but having submitted them to the local jurisdiction, how he shall administer them. He certainly would not be bound to wait an indefinite time for the Mexican govern-

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[*320] ment or a Mexican creditor *to interpose; and it is of decisive importance, that the person, who claims according to the order of payment prescribed by the Mexican law, is not a Mexican creditor, but an inhabitant of Canton, to whom the Mexican government owed neither assistance nor protection. Had he preferred his claim to an administrator in Mexico, he doubtless would have been paid according to the rule of priority there, the order of payment being regulated by the law of the forum. But the authorities might have referred him to the administrator here, who is not bound to give him any advantage, to which he is not entitled in common with the domestic creditors. Were a Mexican creditor to appear, the case would be different. Perhaps our courts would direct a portion of the assets, sufficient for the demand, to be returned to the proper officer in that country: certainly they would not compel payment to be made in a way to deprive him of any advantage he could claim by its laws, or suffer him to be prejudiced by an irregular abduction of the assets from its jurisdiction. But the appellant is not entitled to the same consideration; and we are satisfied that the instrument, under which the assignees claim, was properly preferred as a specialty.

Decree affirmed.

Cited by Counsel, 6 Barr, 369; 7 Barr, 515; 7 H. 480; 10 H. 518; 4 S. 24; 25 S. 204; 7 N. 132.

Cited by the Court, 1 W. 409; 5 W. 344; 2 W. & S. 209; 4 H. 66; 13 Wr. 161, 525; 21 S. 340.

[PHILADELPHIA, FEBRUARY, 1832.]

Toland *against* Tichenor.

In pleading in abatement the pendency of a former suit for the same cause of action, it is necessary to aver, that the former suit remained depending and undetermined at the time of the plea pleaded.

HENRY TOLAND, the plaintiff, having brought suit in this court to July Term, 1827, against Gabriel Tichenor, and declared in *assumpsit*, the defendant, on the 10th of December, 1831, pleaded in abatement, that before the commencement of this suit, the plaintiff had brought suit against the defendant for the same cause of action in the District Court of the United States, for the Mississippi district. The plea concluded with an averment, "that the plea aforesaid remained at the time of the commencement of the present suit depending and undetermined in the said District Court," &c., but it contained no averment, that it remained so at the time the plea in abatement was pleaded.

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The plaintiff demurred to the plea, and the defendant joined in demurrer.

It appeared from an exemplification of the record, that the suit in Mississippi was discontinued on the 14th of August, 1827.

**Stroud and T. Sergeant*, in support of the demurrer. [*321]

1. The plea in abatement is defective in not averring the pendency of the other suit at the time of pleading, but merely that it was pending and undetermined at the commencement of this suit. All the forms contain an averment, that the other suit remains undetermined at the time of the plea pleaded. This is a strong argument in favour of the necessity of such an averment, and quite sufficient to countervail a mere *dictum* of Chief Justice Parsons, in a case, in which the point did not arise, when, too, the authorities in the year books, to which he refers, do not support him. 2 Chitty Pl. 466; 1 Wentw. 8, note; Story Pl. 120, 121; Marston v. Lawrence, 1 Johns. Cas 397; Sellon's Pr. 44. In this case, the omission was not accidental, for the fact would not have supported such an averment. The record showed that there was no suit pending in Mississippi when the plea here was put in, for it had been previously discontinued. The plea admits that if the suit there had been discontinued before the commencement of the suit here, there would be no objection to the latter suit, but if a suit instituted in another place cannot be discontinued, after suit brought here and before plea pleaded, the effect is to deprive a citizen of Pennsylvania of the privilege of suing in the courts of his own state, which is hard and unreasonable. To say it is vexatious towards the debtor, is to argue with an eye to his interest only, and to disregard that of the creditor entirely. Why should the plaintiff be subjected to the expense and inconvenience of a foreign jurisdiction any more than the defendant? The opposite argument goes upon the idea, that the plaintiff has elected his jurisdiction, but this is an error; he makes no election, but is compelled to sue wherever he can find his debtor. The courts in England have concurrent jurisdiction, and if after having sued in one, a party chooses to sue in another, it is mere wantonness, and will not be permitted. But the courts of any of the king's foreign dominions are not so regarded. The pendency of a suit in Ireland, Scotland, or the West Indies, cannot be pleaded in abatement of a suit in England, because the plaintiff had no choice, but was obliged to sue where he could. The reason applies with at least as much force to a citizen of Pennsylvania, whose debtor has been sued in another state, and then comes into Pennsylvania, which is the natural jurisdiction of its citizens, particularly when the debt is incurred here. He knows his own

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tribunals and his own laws, but knows nothing of those of Mississippi. The courts of the United States, when deciding on matters within a state, are state courts, and governed by state decisions. The District Court of Mississippi is, therefore, a state court, and in every respect substantially foreign, as respects Pennsylvania.

2. The District Court of the United States for the Mississippi District, was a foreign tribunal as regards Pennsylvania, and, therefore, if that suit were still pending, it would be no ground for abating the present writ. The constitution of the United States provides, that full faith and credit shall be given in one [*322] state to certain things done *in another. This provision assumes that the states are foreign to each other, for if they were not, it would not have been necessary. So far as respects the matters thus provided for, they cease to be foreign. The object was not to consolidate the states, but to form a national government for certain purposes. Had it not been for the constitution, the states would have stood towards each other in the relation of foreign governments in every respect, and they are so now, except so far as that instrument binds them together. The question, however, is not whether the states are foreign to each other, but whether their tribunals are foreign or domestic. No court can properly be called domestic in Pennsylvania, which has not some relation to this court, which is the supreme court of the last resort in the state. The District Court of Mississippi cannot be considered, in any sense, a court of Pennsylvania, nor has it any relation to this court. It is, therefore, a foreign court, except so far as the constitution of the United States has operated on the subject, which it has done to the extent of providing a mode of authenticating its acts. But a judgment, proved in the manner provided for, has not the effect of a judgment in Pennsylvania, which operates *per se*, while it is necessary to bring suit on the judgment of another state before effect can be given to it. The clause in the constitution which relates to this subject has a view to evidence and nothing more. It leaves the states as they were, in respect to what they have a right to do, but provides a mode of proving what they have done; a bill of exchange, therefore, drawn in one state on a person in another state, is a foreign bill. *Buckner v. Findley*, 2 Peters' Rep. 586. Judge Washington, in that case, (p. 592,) says that the courts of nearly all the states have decided that a judgment of another state is a foreign judgment. This, being a matter growing out of the constitution of the United States, is peculiarly within the province of the Supreme Court of the United States, and their decision upon it is conclusive. Substantially, a judgment of another state is a foreign judgment.

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A contrary rule would produce great mischief. The States differ in their laws and the modes of administering them. We do not know what the justice of Mississippi may be, and if its justice differs from ours, it is not justice to a citizen of Pennsylvania. It is her justice alone, which is entitled to that name in reference to her citizens. If the other suit is pending before a foreign tribunal, nothing can be more clear, than that it is not the subject of a plea in abatement here. *Mills v. Ducoy*, 7 Cranch, 485; *Bowne v. Joy*, 9 John. Rep. 221; *Walsh v. Durkin*, 12 John. Rep. 99.

3. The District Court of the United States for the Mississippi District, is a court of inferior and limited jurisdiction, and the plea does not show that it had jurisdiction of the suit in question. Pleas in abatement are not favoured. They must be certain and clear, and set forth everything necessary to support them. *Jackson qui tam v. Gisling*, 2 Str. 1169. To render this plea good, it should have stated everything necessary to show that the District Court of Mississippi *had jurisdiction of the suit, the pendency of which was pleaded. [*323] We know nothing of the power and jurisdiction of the court referred to. In general, the District Courts of the United States have not jurisdiction of such suits, and if that of Mississippi had, it ought to have been shown by the plea. *Wheeler v. Raymond*, 8 Cowen, 314.

4. The writ issued out of this court, being a general writ, giving no specific information of the cause of action, and a discontinuance being entered in the former suit, before the plaintiff counted in this court, the plea of *auter action pendent*, is inapplicable and cannot be maintained. 2 Browne, 175.

Pettit and *J. R. Ingersoll*, *contra*, called the attention of the court to the pleadings and the facts they presented, observing that the court would not go beyond them. The first objection, they said, was purely technical. *Sparry's Case*, 5 Co. 61, has furnished the rule for all those, which came after it. It contains the whole law on the subject, and subsequent cases are mere repetitions. It may be summed up in a few words; that a man shall not be vexed twice for the same cause, unless the first action was in an inferior court. If there is a writ in being when a second is sued out, the law considers the last suit as plainly vexatious, which shows, that both need not be in existence at the time of the plea pleaded; 1 Ba. Ab., 23, 24; *Freeman*, 401; *Combe v. Pitt*, 3 Burr. 1432. There is nothing before the court to show judicially, that the suit in Mississippi was discontinued, and they, therefore, ought to presume it is still pending. But if this were regularly shown, it does not affect the validity of the plea. If

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the suit in this court was not maintainable at its commencement, it cannot be supported by anything which occurred afterwards. The discontinuance had no relation back. It operated only from the time when it was entered, and at that time two suits were proceeding for the same cause of action in different courts. *Bezaliel Knight's Case*, 2 *Ld. Ray.* 1014. There is neither reason nor authority for the position, that the pendency of the former suit, at the time of the plea pleaded, must be averred. It is true, the precedents generally contain such an averment, but although they are entitled to respect, they do not make the law, and the text and notes of the writers of elementary treatises, do not say, that such an averment is required. There is, on the other hand, high authority against the position. Chief Justice Parsons, in *Comm'th v. Churchill*, denies the necessity of such an averment, and says, it is enough to aver the pendency of the first suit when the second was commenced. The decisions of Virginia, Connecticut, and Massachusetts have settled the law in those states as we now contend for it, and those of Pennsylvania lean to the same doctrine. *Johnson v. Bowers*, 4 *Hen. & Munf.* 487; *Hart v. Granger*, 1 *Conn. Rep.* 154; *Clifford v. Cony*, 1 *Mass. Rep.* 495; *Comm'th v. Cheney*, 6 *Mass. Rep.* 347; *Renard v. Marshall*, 1 *Wheat.* 17; *Mechanics' Bank v. Fisher*, 1 *Rawle*, 347; *Engle v. Nelson*, 1 *Penn. Rep.* 442. In New York the decisions have been contradictory; *Jenkins v. Pepoon*, 2 *John. Ca.* 2, 312; **Embree v. Hanna*, 5 *John. Rep.* 101. If [*324] the question should come up again in the courts of New York, they would probably review their contradictory decisions, and place the matter on the same footing that the English courts have done, and those of our sister states. Reason and policy support the present plea. If after a suit is commenced in one state it may be discontinued, for the purpose of supporting another suit, already brought in another state, the expense, vexation, and oppression, to which the defendant is subjected, are just the same, as if the discontinuance had never been entered, and the effect will be to prevent persons, against whom suits are pending in their own states, from travelling out of them.

The error of the New York decisions is, that they treat the courts of other states as foreign tribunals, an opinion which is now exploded. The cases of *Evans v. Tatem*, 9 *Serg. & Rawle*, 259, and *Benton v. Burgot*, 10 *Serg. & Rawle*, 240, are conclusive as to the domestic character of a judgment in the court of a sister state. The jurisdiction of a court is never mentioned in the plea, unless it appear from the record, that it is an inferior court, in which case it must be shown, that it has jurisdiction. The case of *Jackson v. Gisling*, went upon the necessity of showing the days, on which the two suits were respectively com-

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menced, as both were to the same term. The court, in which the first suit was brought in this instance, was not one of inferior and limited jurisdiction, and if the plea had set out its jurisdiction, it would have been an admission of its inferiority. In Mississippi there is no Circuit Court, and the District Court has the powers and jurisdiction of a Circuit Court. Judiciary Act of Sept. 14, 1788, sec. 12; Serg. Con. Law, 185, (2d ed.) It is a court of record, which, in legal contemplation, is the criterion of a superior court.

The opinion of the court was delivered by

HUSTON, J.—The argument in this case has embraced a much wider space than is necessary to decide this cause. It is conceded, that all the precedents are, that the former action is pending at the time of plea pleaded. The plea in this case is, that the suit in Mississippi remained depending and undetermined at the commencement of the present suit. No authority has been produced to support this plea as pleaded. The case in 2 Ld. Ray. 1014, and the same case in Salkeld, do not. It is there decided, that the plaintiff cannot discontinue his former suit after the defendant has pleaded it to the second. It is, however, plainly inferrable from the short note of that case, that the plea was in the usual form, viz., that the former suit was still pending at the time of plea pleaded. The modern authorities seem to say, that although the former suit is pending when the plea in abatement is put in, yet the plaintiff may after that discontinue it, and reply, that there is no such suit pending. The plea in this case is then bad in not stating, that the former action was still pending at the time of the plea pleaded, and the defendant must answer over.

Cited by Counsel, 3 W. & S. 398; 4 H. 245; 18 S. 221; 28 S. 80.

Cited by the Court, 8 Wr. 331.

*[PHILADELPHIA, FEBRUARY, 1832.]

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Lee *against* Dean.

IN ERROR.

An alderman has no jurisdiction of an action to recover damages for a deficiency in quantity, on a contract for the sale of land.

WRIT of error to the Court of Common Pleas of *Philadelphia* county.

The defendant in error, John Dean, was plaintiff below, and the plaintiff in error, William Lee, was defendant below.

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Brewster, for the plaintiff in error.*Graham*, for the defendant in error

The opinion of the court was delivered by

ROGERS, J.—The defendant Lee, sold to the plaintiff Dean, a tract of land, in the state of New Jersey, containing seventy-two acres, more or less, for one thousand dollars. Dean paid Lee the purchase-money, and in all other respects complied with his contract, and Lee gave him a deed, which he accepted for the land. Dean brings suit before an alderman of the city of Philadelphia, alleging that there is a deficiency of one acre and one hundred and four perches, and for this he demands damages. The only question which it will be necessary to notice is, whether the alderman had jurisdiction of the cause. In conferring jurisdiction on inferior courts, held by aldermen and justices of the peace, the legislature have evinced great care in withdrawing from them a certain description of cases, which, it is supposed, may be more safely lodged in courts of a more general jurisdiction. In the first section of the act of the 20th March, 1810, it is enacted, that the justices of the peace of the several counties of this commonwealth, shall have jurisdiction of all causes of action, arising from contract either express or implied, in all cases where the sum demanded is not above one hundred dollars; “except in cases of real contract, where the title to lands or tenements may come in question.” And in the act of 22d March, 1814, they have been equally careful to limit their jurisdiction. “Nothing in the act contained, (referring to the act regulating the proceedings of justices of the peace and aldermen in cases of trespass, trover, and suit,) shall be construed to extend to actions of ejectment, replevin, or slander, actions on real contract for the sale, or conveyance of lands and tenements.” The acts are *in pari materia* and in effect, [*326] *speak the same language, about the meaning of which there can be but little difficulty. “Real contracts,” means contracts in respect to real property. It is not where the title does, but where it may come in question, which is in every case of contract for the sale or conveyance of lands and tenements. A judgment by a justice of the peace does not bind real property, nor can he take lands in execution. In short, a justice of the peace as such has nothing to do with that species of property. What then, was this case, but a reference to a justice to put a construction on a contract for the sale of land, involving principles, which at all times, are among the most nice, difficult, and technical in the law. The plaintiff says, “By my contract I have a right to seventy-two acres of land, and you have conveyed to me but about seventy, and for this I claim

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damages." This demand, we think, comes clearly within the letter and spirit of the act. We are of opinion that the aldermen had no jurisdiction, and that the judgment should be reversed.

Judgment reversed.

Cited by Counsel, 3 Wh. 114, 321; 6 W. 337; 8 H. 466.

[PHILADELPHIA, FEBRUARY 2, 1832.]

Werkheiser *against* Werkheiser and Others.

APPEAL.

The presentation of a petition to the Orphans' Court, setting forth, that the petitioner's father died seized of the premises therein described, leaving a widow and seven children, and praying the court to award an inquest to make partition, &c., does not estop the petitioner from afterwards maintaining an ejectment for the same premises, and proving, that they were the estate of his mother, who was his father's first wife, and descended to him as her heir, to the exclusion of his brothers and sisters, the children of a second wife.

A plaintiff, who claims under an equitable title must do equity before he can recover in ejectment.

Where, therefore, the defendant has acted with good faith, he is entitled to be reimbursed the money he has expended in perfecting the title and making improvements, but if he has acted *mala fide*, and endeavoured to defraud the plaintiff, he is not entitled to the benefit of this principle, or if he be entitled to anything, it is only to the balance, which may appear to be due after deducting the rents, issues, and profits during the time he enjoyed the land.

THIS was an action of ejectment for a tract of land, situated in Hamilton township, in *Northampton* county, containing two hundred and fifty acres, or thereabouts, brought by George Werkheiser against Margaret Werkheiser, widow of Charles Werkheiser, and the minor children of the said Charles [*327] Werkheiser, who appeared by their *guardians. The cause was originally instituted in the Court of Common Pleas of Northampton county, and removed by the plaintiff to the Circuit Court.

On the trial before Judge Huston, at Easton, on the 8th of April, 1831, the counsel for the plaintiff, having stated in his opening, that the plaintiff claimed the premises in dispute, as an inheritance from his mother, who was a daughter of Barnet Fenner, who died in the year 1804, leaving two children, to wit, Henry and Margaret, who intermarried with Charles Werkheiser, and whose only surviving child was the plaintiff, proposed to show his title. To this the counsel for the defendants, objected on the ground, that by certain proceedings in the Orphans' Court of Northampton county, at January and

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April Terms, 1828, George Werkheiser, the plaintiff, was estopped from maintaining this action, or from denying, that Charles Werkheiser was in his lifetime seized in his demesne as of fee of the property in dispute; that he died intestate seized thereof, and that it descended to all his children as tenants in common.

It appeared, that at January Term, 1828, George Werkheiser, the present plaintiff, presented a petition to the Orphans' Court of Northampton county, in the usual form, setting forth, that the petitioner's father, Charles Werkheiser, died intestate, leaving a widow and seven children, and seized of the real estate described in the petition, (the land in dispute,) "being the same premises which Henry Fenner and Margaretta, his wife, by their indenture bearing date the 4th day of April, A. D. 1817, conveyed to the said Charles Werkheiser in fee," and praying the court to award an inquest to make partition, &c. The petition was held under advisement until the next term, when the court awarded an inquest, but no inquisition was held, and no further proceedings took place.

Judge Huston overruled the objection, and permitted the plaintiff to give his title in evidence.

After having given in evidence an application by Henry Woolery, dated March 7th, 1786, for two hundred and eighty acres of land, including an improvement; a warrant of the same date, and a survey of the 23d of October, 1795, of two hundred and fifty acres and a half, and allowance, returned into the surveyor general's office on the 26th of March, 1805, proved, that in the year 1802, John Fenner entered into an article of agreement with Henry Woolery, for the purchase of this land, and immediately after assigned the agreement to his brother Barnet Fenner. When the article of agreement was drawn, Woolery refused to execute it, unless some money was paid, upon which Barnet Fenner paid him five dollars, and the payment was indorsed upon the agreement. The article of agreement was lost after the death of Barnet Fenner, but the contents of it were given in evidence, from which it appeared that the purchase-money was one thousand pounds, of which two hundred dollars were to be paid down, and one hundred dollars every year until [328] the whole was paid. Woolery was to convey a title to John Fenner in about five years after the first payment.

It was also proved, that in the spring of 1803, Barnet Fenner took possession of the place, and paid part of the purchase-money. During the summer he cleared some land, built a stable, and made a chimney to the house. He put Charles Werkheiser on the land, who helped to clear, plough, and sow it, but Fenner

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managed the property himself. Charles Werkheiser continued to reside upon it, until he died in the year 1827. Barnet Fenner left two children, viz., Henry and Margaret, the wife of Charles Werkheiser, who died soon after her father.

Barnet Fenner, at the time of his death, had not paid more than one hundred dollars on account of the purchase from Woolery. After his decease, Henry Fenner and Charles Werkheiser and his wife made a division of his property. By the arrangement between them, Henry Fenner was to pay his father's debts and maintain his mother. He was to take a tract of land containing upwards of two hundred and thirty acres, with a stone grist-mill and saw-mill erected on it, and Werkheiser was to take the Woolery place, Henry having offered him the choice of the two, and he having chosen the latter. On the 26th January, 1804, an article of agreement founded upon this arrangement, was entered into between Henry Fenner and Charles Werkheiser. Henry Fenner gave his bonds to Woolery for the balance of the purchase-money, which remained due, according to the terms of the original agreement; but as Fenner wished to have a deed before Woolery was bound to give it, he anticipated several payments, went with Woolery to Lancaster to assist him in procuring a patent for the land, which was obtained on the 26th March, 1805, and on the 29th of the same month received a deed from Woolery. Henry Fenner, who was examined as a witness on behalf of the plaintiff, swore that there was no alteration in the original agreement with Woolery, nor any new bargain made between himself and Woolery, but as he refused to execute a deed sooner than had been agreed, unless the money were paid sooner, Fenner anticipated the payments in order to get a deed. From the evidence of Henry Fenner, it appeared that the arrangement respecting the division of Barnet Fenner's property took place at his house, and that Werkheiser's wife and her mother were in the house at the time, and that Werkheiser and wife executed a release to him. While Henry Fenner was under examination, the defendant's counsel proposed to ask him the following question: "Were Mrs. Werkheiser, the wife of Charles Werkheiser, and Magdalena Fenner, the widow of Barnet Fenner, present with you and Charles Werkheiser on all occasions of which you have spoken, after the death of Barnet Fenner, and did they not participate in all that occurred?" This question was objected to by the plaintiff's counsel, and overruled by the judge, who noted an exception to his opinion.

When the plaintiff had closed his evidence, the defendant, after *having given in evidence the patent to Woolery [329] already mentioned, the deed from Woolery to Henry Fenner, of the 29th March, 1805, a deed for the same premises

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from Henry Fenner to Charles Werkheiser, dated the 4th April, 1817, and a release dated the 3d February, 1804, from Magdalena Fenner, the widow of Barnet Fenner, and Charles Werkheiser and Margaret, his wife, to Henry Fenner, made an offer in writing to prove, ["That Charles Werkheiser, when he married Margaret Fenner, had between three hundred and fifty and four hundred dollars in money : That he bought on his marriage the necessary household goods : That he lived with and worked for Barnet Fenner for a period of about six years previous to the contract being entered into for the purchase of the Woolery tract : That on the removal of James Chestnor, (who had been Woolery's tenant,) in the spring of 1803, Charles Werkheiser went into possession of the Woolery tract, of which there were then but a few acres cleared, and those only partially—the buildings on which consisted of an old cabin without a chimney : That Charles Werkheiser cleared between that time and the time of his death about one hundred and thirty acres of the said tract, and reduced it from a state of wilderness and underwood to a fine state of cultivation : That he in a great measure cleared the farm from stones, made stone fences round the fields, limed and improved the farm : That he built two houses, repaired the barn, and built an addition to it ; built a two-story stone spring-house, a cider-house, and cider-press upon it, and in fact expended the whole labour of his life upon the property : That after the decease of his first wife, he married Margaret Stroh, now Werkheiser, one of the defendants, by whom he received a sum of money amounting to about

dollars, all which together with his own patrimony went to the improvement of this property : That the personal property of Charles Werkheiser is insufficient for the payment of his debts, most of which were incurred in the improvement of the property in dispute, and that the defendants, who are minors, are the children of the said Charles Werkheiser.]

"That Barnet Fenner did not pay the purchase-money agreed on between John Fenner and Woolery according to the contract, and after his death a new agreement was made between Woolery and Henry Fenner, by which he sold the property to Henry Fenner, who received a legal title therefor, which has been regularly transmitted to Charles Werkheiser : That Charles Werkheiser, in his lifetime, always treated the property as his own, and after his death George Werkheiser, the plaintiff, styling himself the oldest son and heir-at-law of the said Charles Werkheiser, deceased, presented his petition to the Orphans' Court of Northampton county, setting forth, that the said Charles Werkheiser, deceased, died on the 25th December, 1827, seized in his demesne as of fee of and in the premises in dispute, which

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it is stated in the petition, were conveyed by Henry Fenner to the said Charles Werkheiser, his heirs and assigns in fee by the deed already given in evidence: and praying the court to award an *inquest to make partition of the said premises to and among the children and representatives of the said in- [*330] testate in such manner and in such proportions as is directed by the laws of this commonwealth, &c. ; which inquest was awarded by the said court to make partition of the premises to and among the widow and all the children of the said deceased. (Prout, the said partition and record made a part of the offer.)”

The plaintiff’s counsel objected to the evidence thus offered, and the judge rejected so much of it as is printed in brackets. The counsel for the defendants excepted to his opinion, and the exception was noted.

The defendants then examined a witness who swore, that he heard Henry Fenner say, that Woolery wanted his money faster than it came due by the payments, and therefore they made a new bargain, that he might get it faster. They then called Jacob Anglemoyer, and offered to prove by him, “that on the day, on which the sheriff served the writ in this case, he had a conversation with Henry Fenner, in which Fenner told him, that George Werkheiser had told him he had no right to make a deed for the property in dispute after his mother’s death: that he told George, he could not help it: he was bound to make Charles Werkheiser a good title, and if the title was not good, he was bound to make it good.” This evidence was also objected to by the plaintiff’s counsel, and overruled by the judge, to whose opinion an exception was taken.

The defendants closed their case by giving in evidence the record of the proceedings in the Orphans’ Court already referred to, and reading the record of this suit, which was commenced on the 26th June, 1828.

The cause was submitted without argument to the jury, who, under the direction of the court, found a verdict for the plaintiff.

The defendants moved for a new trial, for which their counsel filed the following reasons:—

1. The court erred in rejecting the evidence offered by the defendants to prove, that upon all the occasions after the death of Barnet Fenner, deceased, whereat any of the transactions relative to the arrangement of his estate took place, Mrs. Werkheiser, the wife of Charles Werkheiser, and Magdalena Fenner, widow of Barnet Fenner, attended with Charles Werkheiser, Henry Fenner and his wife, and participated in all that occurred.

2. The court erred in rejecting the evidence contained in the written offer of the defendants.

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3. The court erred in rejecting the evidence offered to be given by Jacob Anglemoyer.

4. The court erred in charging the jury, that the plaintiff, under the evidence in the cause, was entitled to recover, and the following reasons are assigned why he should not recover :

1st. Because a perfect legal title to the premises in dispute [*331] was *shown in Charles Werkheiser, which at his death descended to the plaintiff, and the infant defendants, in common, subject to the dower or thirds of his widow, one of the defendants.

2d. That this was a family arrangement, made with the approbation of all the persons interested in the estate of Barnet Fenner, deceased, and it was against equity to permit the plaintiff to recover.

3d. That by the proceedings in the Orphans' Court of Northampton county at January and April sessions, 1828, George Werkheiser, the plaintiff, is estopped from maintaining this action, or from denying that Charles Werkheiser was in his lifetime seized in his demesne as of fee of the property in dispute, and died seized thereof intestate, and that the same descended to all his children, in common.

4th. That, if as is supposed on the part of the defendants, the legal title to seven-eighths of the property in dispute is in the defendants subject to an equity of the plaintiff, that equity should have been satisfied before the plaintiff could recover.

The motion for a new trial was overruled, and the defendants appealed to the Supreme Court.

Brooke and J. M. Porter, for the defendants. When Woolery entered into the agreement with John Fenner, he had not perfected his title to the land in dispute. This agreement was not carried into effect in the lifetime of Barnet Fenner, and no title was ever vested in him. This is proved by no trust being mentioned in the patent or in the deed from Woolery to Henry Fenner. The legal title was clearly vested in Charles Werkheiser by reason of the patent to Woolery, his deed to Henry Fenner, and Fenner's deed to Werkheiser. *Duer v. Boyd*, 1 Serg. & Rawle, 214; *Moody v. Vandyke*, 4 Binn. 31; and his *bona fide* vendee would have been entitled to hold the land discharged of the supposed trust. The legal title is, therefore, clearly vested in all his children. But the defendants have also an equitable title. Woolery, when he contracted to sell to Fenner, had not paid the purchase-money, and received a patent, and consequently had no title against the Commonwealth. Barnet Fenner, who was the common ancestor of the plaintiff and the defendants, paid at the outset, but five dollars towards the pur-

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chase-money, and immediately put his son-in-law in possession of the land. He failed altogether to comply with his contract, and the rule is, that if the vendor put the vendee in possession, and the contract is not complied with, the vendor may maintain ejectment. *Mitchell's Lessee v. De Roche*, 1 Yeates, 12. Woolery therefore might have brought an ejectment against Fenner, and recovered the possession, and he did what was equivalent to it. The contract was rescinded by the consent of every one, who was interested in it, the wife of Charles Werkheiser, among the rest, who was perfectly competent to do what she did. *Jourdan v. Jourdan*, 9 Serg. & Rawle, 268, 276; *Share v. Anderson*, 7 Serg. & Rawle, 43; *Reed v. Morrison*, 12 Serg. & Rawle, 18. The original agreement being thus at an end, Henry Fenner, who had made a new contract *with Woolery, covenanted to make Werkheiser a good deed, [*332] and Werkheiser executed a release to him, the consideration for which was one thousand pounds, and other considerations, namely, the division of the personal property of Barnet Fenner, and the payment by Henry of the debts of his father. The Woolery tract was not mentioned, which is an important feature in the transaction. The error of the judge, who tried the cause, was in assuming that the property belonged to Werkheiser's wife. This was not the case. She had no interest in it, for a new arrangement took place, to which she was a party, by which her interest, if she ever had any, was divested. The title was in Henry Fenner, by whom a new contract was made after the death of his father, who had not complied with the terms of his agreement, and it afterwards was vested in Werkheiser himself without his wife, by Fenner's deed to him. If the arrangement, which took place after the death of Barnet Fenner, was not binding in every respect, it was void altogether, and then the property instead of descending to Mrs. Werkheiser alone, descended to her and her brother Henry Fenner, as tenants in common; and on this ground there should be a new trial.

Having the legal title, before the property can be swept away by the plaintiff upon equitable grounds, he must do equity by compensating the defendants for what has been expended upon it by their father. Charles Werkheiser expended in the improvement of this farm, his own patrimony, and the labour of his whole life. He married again, and received a large sum with his second wife, which also went to the improvement of this property. It is equity, therefore, that before the plaintiff shall be permitted to take away what he claims as his mother's land, he should reimburse his brothers and sisters, their mother's money, which has gone to the improvement of that land, as well

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as the labour and expenditure of their common father, who made these improvements under the belief that the property was his own, and would descend to all his children. If the defendants are really trustees for the plaintiff, the rule of equity applies, that the *cestuy que trust* must refund to the trustee the value of all the permanent improvements he has made, unless there has been fraud, which is not to be imputed without evidence in any case, and still less is it to be presumed, a father has defrauded the son. The questions as to the nature and extent of the improvements, the means by which they were made, and the design in making them, were for the jury, and the court did wrong in refusing to permit the evidence in relation to these facts to go to them. *Peebles v. Reading*, 8 Serg. & Rawle, 494.

The plaintiff was estopped by the proceedings in the Orphans' Court, in which he refers as the foundation of his petition, to the very deed under which the defendants claim. The Orphans' Court is a court of record, and all that is transacted in it and entered on its records, is matter of record. *M'Pherson v. Cunliffe*, 11 Serg. & Rawle, 429. There are three kinds of estoppel. 1. By matter of record. 2. By matter in writing. 3. By matter without writing. In this case the estoppel was of the first and highest description. A man may be estopped even by a recital, which does not present a case, by any means so strong as this, in which a direct averment is made upon the record of facts, which the party, who made it, now endeavours to contradict. This the law will not permit. *Arch. Civ. Pl.* 318; *Co. Litt.* 352; *Cro. El.* 756; 10 *Vin. Ab.* 422, 455; *Moore*, 420; *Raynsford v. Smith*, Dyer, 196, note a; *Cutler v. Dickinson*, 8 *Pick.* 388; *Anderson's Appeal*, 4 *Yeates*, 35; *Martin v. Ives*, 17 *Serg. & Rawle*, 364.

The court declined hearing *Hepburn* and *Jones* on behalf of the defendants.

The opinion of the court was delivered by

Ross, J.—The question for our decision is, whether the proceedings in the Orphans' Court estopped the plaintiff from showing his title. The petition and facts set forth in it amounted to no more than an admission, which under some circumstances, might be of little or no weight; but which, if made under other circumstances, might be of great weight and importance. They, however, never could operate as an estoppel. If a man institute a suit, and has made an error in declaring, or in the parties to the action, he may discontinue it, and proceed in such other form as the nature of his case may require, without being estopped, even though the second suit be founded upon a cause of

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action different from the former, and denying the allegations in the first declaration. Such allegations would indeed, in most cases, operate very slightly, if at all, against him. Nothing more was done in this case. The plaintiff committed an error in presenting the petition, and probably upon discovering his mistake, relinquished the proceedings under it, and adopted the action of ejectment. Estoppel is quaintly defined, stopping a man's mouth from speaking the truth, 1 Inst. 227; and it is a principle only to be admitted in equity, when it consists with the honesty and justice of the case even in reference to records. Where the justice and equity of a case require the interference of chancery, that court does not reverse the judgment, but they decree and enforce what equity requires to be done between the parties. Even where a record is an estoppel to the party, it must be direct, and in point to the fact, which the party is estopped from proving contrary to the record. Co. Lit. 352; *Hume v. Burton*, Ridg. 25, 102. In this case, there was nothing, but a mere recital of what, at the time, the plaintiff supposed, was Charles Werkheiser's title. Rehearsal is not estopped. 10 Vin. 555, Pl. 7. If a man recite by indenture, that whereas he holds certain land of the lease of his father, and he releases to him in fee, yet he may afterwards say, that the lessee had not any estate, upon which the release might move, for that it is but a recital. 10 Vin. 455, Pl. 5. Many other similar cases may be found in the same book. Again, one shall not be estopped, but of that of which he *may have a traverse. *Morgan v. Vaughn*, T. Raym. 457-8. I believe it will not be [*334] pretended, that this inquisition could be traversed. (See 8 Mod. 311, 312, 313; 1 Stra. 610; 3 Dan. 272.) So if one seized in fee takes a lease of the herbage of his own land, he is not estopped from claiming the fee. 2 Leon. 159, *Pleadall's Case*. If on avowry for distress for rent, the tenant pray in aid claiming a lease for ten years, whereas he had a lease for sixty, his executors shall not be estopped from claiming to the end of the term against the lessor, or grantor of the reversion. Jenk. 275. Cases might be multiplied on this subject almost without number. I will, however, only add one or two decisions made by the courts of our own country. In the case of *Owing v. Bartholomew*, 9 Pick. Rep. 521, it was held, that where a tenant of land presented a petition to the legislature, admitting that the land belonged to the commonwealth, and praying that it might be granted to him, and that thereupon the land by authority from the legislature was sold to another person, the tenant was not estopped from setting up his title, but the admission in his petition, and his declaration that the land did not belong to him, amounted to no more than strong evidence against him, and that

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the burden of the proof rested on him to show, that such representation was founded in an innocent mistake. By an act of assembly of this state, passed the 13th of April, 1807, it is provided, that where two verdicts shall be given in any writ of ejectment between the same parties in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought, &c. Under this act it has been held, that two verdicts are no bar to a new ejectment, if the court grant a new trial, *Ives et al. v. Leet et al.*, 14 Serg. & Rawle, 301. (See 5 Serg. & Rawle, 410.) I have referred to this act of assembly, and the decision under it, for the purpose of showing the reluctance, with which courts adopt even the salutary provision of an act of assembly, when it operates as an abridgment of the common law, or when it is calculated to prevent an examination of the merits of the case. I also refer to the case of *Martin v. Ives*, 17 Serg. & Rawle, 365, where it was held, that estoppels whenever they produced neither hardship nor injustice, but promoted equity, should merit indulgence, if not favour. In the present case great injustice would probably be done, if the petition were suffered to operate as an estoppel and preclude the plaintiff from giving his title in evidence. I am clearly of opinion, that the admission of the evidence was correct and authorized by every principle of law and equity.

With respect to the other errors assigned, there certainly cannot be a legal doubt entertained of the correctness of the decision of the court below. The evidence offered by the defendant was properly rejected; because it was an attempt to make out a title by parol, without any evidence of part performance. It is true, that where a plaintiff claims under an equitable title, he shall do equity before he shall be permitted to recover. When [*335] the defendant has acted *honestly and with good faith, he is entitled to be reimbursed the money laid out in perfecting the title, or in making improvements; but if he has been guilty of *mala fides*, and has endeavoured to defraud the plaintiff, he is not entitled to the benefit of this wholesome principle; or if he be entitled to it, it is only to such balance as may appear to be due after deducting the rents, issues, and profits, during the time of his enjoyment of the land. Of this he should render an account, and in some cases chancery would direct the master to ascertain the same. In this case, the defendant claimed the absolute fee simple, and would have fraudulently defeated the object of the trust, if it had been in his power to do so. He, therefore, cannot bring himself within the principle referred to. Many important principles applicable to this case will be found laid down by Chancellor Kent in Van-

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horne v. Fonda, 5 Johns. Chan. Rep. 388, a note of which case will be found in 11 Serg. & Rawle, 427.

Upon the whole, we are of opinion, that the errors assigned have not been made out, and direct the judgment to be affirmed.

Judgment affirmed.

Cited by Counsel, 9 Barr, 55; 10 Barr, 257; 5 C. 313; 8 C. 199; 4 S. 367; 3 O. 224.

Cited by the Court, 9 H. 300.

On the question of estoppel, see note to Adlum v. Yard, 1 R. 163.

[PHILADELPHIA, FEBRUARY 2, 1832.]

The Commercial Bank of Pennsylvania *against* Clapier and Another, Assignees of Hunt.

Where, in a voluntary assignment for the benefit of creditors, provision was made for the payment of a note particularly described therein, the court permitted the assignor to be examined to prove, that at the time of the execution of the assignment, there was not in existence such a note as that described but that there was a note answering the description in every particular, except that instead of being drawn by the assignor in favour of A. as stated in the assignment, it was drawn by A. in favour of the assignor, and discounted by the present holder for his accommodation, and that he intended to provide for the payment of that debt.

THIS action, which was tried before Judge Rogers at Nisi Prius on the 24th of November, 1827, was brought by the plaintiffs, who were the holders of a promissory note drawn by Arthur St. Clair Nichols in favour of Wilson Hunt, dated February 27th, 1826, payable six months after date, for two thousand four hundred and seventy-six dollars and eight cents, and indorsed by Hunt, against the defendants, who were the assignees of the said Wilson Hunt in a voluntary assignment, dated August 4th, 1826, to recover the amount of the said note, which they alleged, was provided for in the assignment as a preferred debt.

The assignment among other things provided, that the assignees should pay "two notes drawn by the said Wilson Hunt, in favour of Arthur St. Clair Nichols, dated February 27th, 1826, at six months," *one of them for two thousand [*336] four hundred and seventy-six dollars and eight cents, and the other of them for nine hundred and seventy-four dollars and sixty-two cents.

After having given the assignment in evidence, the plaintiffs offered to examine Hunt as a witness to prove, that at the time of the execution of that instrument, the plaintiffs held the note

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to recover the amount of which the present suit was brought ; that it was discounted by the plaintiffs for Hunt's accommodation ; that he intended in making the assignment to provide for its payment, and that in fact there were not in existence any such notes as the two described in the assignment.

It was admitted that the creditors of Hunt, who were not preferred, had generally executed a release, agreeably to the stipulations contained in the assignment, in order to entitle themselves to an interest in the estate assigned.

The defendant's counsel objected to the competency of the witness, but the court overruled the objection, and he was examined. His evidence was as follows :—" This is my indorsement (on the note held by the plaintiffs,) I borrowed this note of A. St. Clair Nichols or Edward W. Robinson did for my use. There was not at the time of my assignment any note in existence drawn by me in favour of Nichols. Some time after I got this note, and the one for nine hundred and seventy-four dollars and sixty-two cents, Nichols called and asked me for two notes, or one for the amount of the two, which I gave him, and which he afterwards returned and I destroyed. He had it in his hands four or five days. When I prepared my assignment, I intended to prefer all debts where there was no reciprocity ; and I considered this as one of that class. I am doubtful, cannot say, what was my impression at the time as to the existence of any note other than this. I can only say, that I intended to secure the debt as there was no reciprocity. I was astonished that I had made the mistake. I knew at all times, who was the drawer and who the indorser. I do not recollect at any time having an impression that there was another note.

" I have no recollection as to what was my impression at the time of my assignment as to the existence of a counter note. I intended to prefer this debt. On the 5th day of August, Mr. Robinson, one of the assignees, called on me and mentioned, I had made a mistake, that I had not preferred Nichols, that I had said my two notes to Nichols, and he had not mine, but I had his. I was surprised I had made the mistake and doubted, and requested him to go and examine the assignment. Mean-time I called and examined a copy at Mr. Lowber's office, and discovered that Mr. Robinson's representation was correct. Before he went to the Recorder's office to examine, I told him if it was possible I had made the mistake I would give him two notes to correspond. Finding I had made the mistake, I drew two notes myself ; Robinson called the same day, and I gave him the two corresponding notes, and requested him to give them to [*337] Nichols, *observing they would enable him to claim the benefit of my assignment. I have reason to believe

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that the Farmers' and Mechanics' Bank, and Mahon and Taggart hold the other two notes."

The jury found a verdict for two thousand six hundred and sixty-seven dollars and twenty-seven cents, subject to the opinion of the court as to the competency of the witness and the effect of his evidence.

J. R. Ingersoll and *J. Sergeant*, for the plaintiffs. This case has a close analogy to that of *Heilner v. Imbrie*, 6 Serg. & Rawle, 401, in which the court, construing the assignment, *ex visceribus suis*, decided that the preference was given to the debt, and not to the person named in the instrument as the representative of the debt. Where, taking the whole instrument together, it is apparent that a certain thing was intended, the court will, if possible, give it effect, and will carry into operation the general intention, even if, to effect that object, the particular intention must be sacrificed. An assignment is more in the nature of a last will than a contract, and is entitled to even a more indulgent construction than a will in order to effectuate the intention. A will is not always made under the apprehension of dissolution, when the mind is incapable of applying itself with vigour to the subject before it, but an assignment is always made in the agony of insolvency, and should therefore receive a liberal interpretation. There was a trust to provide for a debt of a certain amount, which was to be satisfied before others of a different description. The assignees accepted the trust to execute it according to the intention of the assignor. It is apparent that the intention was to provide for a privileged debt, which the assignor considered himself bound in honour to provide for, and if it is not paid, his funds will be applied to the payment of debts, for which he made no particular provision, while that for which he intended specially to provide, will remain unpaid. The intention to provide for this debt may be inferred from the instrument itself, without resorting to parol evidence. It is sufficiently identified to leave no doubt on the subject. In date, amount, term of credit, in everything except the mere position of the parties, the note in question corresponded with that mentioned in the assignment, and even in the particular, in which they apparently differ, they substantially correspond. Formerly when a man borrowed the name of another, the note was drawn by the borrower, and in order to have the money passed to his credit in bank, "credit the drawer," was written below, and signed by the payee. On the establishment of the Bank of the United States, they refused to receive notes of this description, in consequence of which a usage was introduced of drawing accommodation notes, in favour of the borrower, by which the indorser became

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the principal, and the drawer the security. In effect, therefore, the note described is exactly the same as that, on which the plaintiffs now claim.

But, if any doubt could exist, it is removed by the parol evidence, which was clearly competent. Parol testimony is excluded in giving *an interpretation to a written instrument, because it tends to introduce uncertainty. Where it leads to the door of truth, it is free from exception. The object in resorting to it on the present occasion, was to establish the truth and render certain what otherwise might be deemed uncertain. It was to prove, that there were no such notes in existence as those described in the assignment, and consequently, as the parties must have meant something, that the note held by the plaintiffs, the only one to which the assignment could apply, must have been intended to be provided for. A latent ambiguity may always be explained. Wherever a devise or a trust would fail, without a resort to extrinsic evidence, it is invariably admitted. In *Heilner v. Imbrie*, parol evidence was rejected, because it tended to vary the deed, and because it would have affected the rights of third persons, which had become vested under it, by matter of which they had no notice; in the present instance no such consequences were to be produced by it. No right was acquired under an ignorance of the actual state of things. The assignment gave notice of a note exactly corresponding with the one in question, except in a single immaterial particular, and any one, who chose to inquire, might have become acquainted with the exact nature of the transaction. It is impossible that any one could be injured by letting in the evidence, the object of which was merely to give effect to the plain intent of the assignor. *Bank of Montgomery County v. Walker*, 9 Serg. & Rawle, 229; *Anderson v. Neff*, 11 Serg. & Rawle, 208; *Watson v. Blaine*, 12 Serg. & Rawle, 136; *Kuyaston v. Nicholas*, 12 Eng. Com. Law Rep. 54; *Doe ex dem Chichester v. Nicholas*, 3 Taunt. 156; 2 Car. & Payne, 120.

Binney, for the defendants. To say, that parol evidence may be admitted wherever a deed would be inoperative without it, would be to introduce a most dangerous principle, to sustain which no authority can be found. Its admissibility may be classed under three general heads. 1st. Where the alleged mistake is contrary to the instructions given for drawing the instrument, in which case chancery will reform it. 2. In the case of a latent ambiguity, where on the face of the deed there is no difficulty, but it arises from extrinsic facts, and parol evidence is necessary to explain it. 3. Where it is clear, the party intended to describe a different thing from that, which he did

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describe. This case, it cannot be pretended, comes within the first class, as there is nothing to show any departure from instructions, or that the assignor is made by the deed to say anything he did not intend to say. Mistake in the effect of an instrument is no ground to reform it. Nor is there any latent ambiguity. In every such case the parol evidence is consistent with the language of the instrument; as where there is a devise to testator's grandson Samuel, and there are two of that name, parol evidence is admissible to show which is meant. *Jackson v. Sill*, 11 John. Rep. 215; *Grant v. Naylor*, 4 Cranch, 235.

*A misdescription may sometimes be rectified by extraneous evidence. If a man devise his house in A. [*339] when he has no house there, but has one in B., in other respects answering the description, this may be shown by parol evidence, and it will pass. But the present is not a case of misdescription. Hunt had given a note corresponding with that described in the deed, and when that instrument was prepared, he did not advert to the fact, that he had destroyed the original note, and given the one now in question. He no doubt supposed, that in giving the preference in the manner he did, he secured the debt, for which Nichols was responsible. But in this he was mistaken, and his mistake cannot now be put right. The distinction is this. If he intended to describe the note drawn by Nichols for his accommodation, and by mistake described the other note, it is a case of misdescription, which admits of a remedy by parol evidence. But if, as was really the case, he intended to describe what he did describe, but was mistaken as to the effect of the instrument, it is a case not of misdescription, but of erroneous intention, which does not admit of such a remedy. What he says was his intention, can under such circumstances have no weight. To admit such evidence would be to rest everything in the breast of the assignor, and permit him to make a new deed at his own pleasure. *Ulrick v. Litchfield*, 2 Atk. 372; 4 Dess. Eq. Rep. 209, 215; *Cas. Temp. Talb.* 239; *Goodinge v. Goodinge*, 1 Ves. 231; 1 Mass. Rep. 91; *Piersons v. Hooker*, 3 John. Rep. 70; 1 Phil. Ev. 511; 2 John. Ch. Rep. 585, 631; 1 Mad. Ch. 49, 50; 1 Bro. Ch. Ca. 350.

The opinion of the court was delivered by

GIBSON, C. J.—It seems clear on one of the grounds assumed in the argument, though not on all, that the evidence was not only competent, but such as to entitle the plaintiff to a verdict. As the object was, among other things, to secure what is in substance the very debt, though erroneously described in the assignment, it has been insisted that the evidence was proper to explain, without changing the legal effect of the instrument, a matter

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that appeared unambiguous on the face of it. Necessity, however, not accident, is the foundation of parol evidence to explain a latent ambiguity, such evidence being indispensable to distinguish a person or thing called by the right name, from another person or thing bearing the same name, or to ascertain a person or thing purposely miscalled. I had once the pleasure to know an eccentric gentleman, who gave a legacy to a young lady by the appellation of Hyder Ally, a name by which he had been accustomed to distinguish her in childhood; yet no one supposed, that she was thus designated in his will by accident. In the case at bar, there certainly was no intention to describe the note otherwise than as it was supposed to exist; and that it was not truly described, is attributable to misapprehension. The instrument, then, being free from intentional ambiguity, would at law be left to its technical meaning. On the proofs in the cause, [*340] however, it would *undoubtedly be reformed in equity. Against the competency of the evidence on that ground, it has been argued, that as no fact has been disclosed to reform by, proof of an intention different from what appears on the face of the instrument, is not to be received. That, however, is not to be conceded. The evidence on which an instrument will be rectified for a plain mistake of fact, is either intrinsic, as arising from a recital; or extrinsic, as arising from another instrument, on which it is founded, or from independent documents, such as letters, instructions to the scrivener, or a counterpart; or from parol proof, with this qualification that if it be so clear as to satisfy a chancellor beyond a doubt of the concurrent intention of the parties. Here it satisfactorily appears, that shortly after Mr. Hunt had obtained the note indorsed by him to the plaintiff, but described in the assignment as drawn by him, Mr. Nichols, the actual drawer, called on him, and obtained a counter note, which, however, in the course of a few days was delivered up to be cancelled; and though Mr. Hunt does not remember his particular impression in regard to its existence at the time of the assignment, he distinctly testifies that he meant to prefer this particular debt, and that he was afterwards astonished to find, he had described it in terms, which excluded it from the trust. Undoubtedly this is enough to entitle the plaintiff to relief. But it is further objected, that as Mr. Hunt described the debt exactly in the terms he intended, the mistake was in a collateral matter, and not in the composition of the instrument. It must be conceded that a mistake about a circumstance, which had no other connection with the matter in hand then as constituting the inducement of the party to enter into the contract, is no ground for relief. But on the other hand, it is not essential that intending to write down one thing, he

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should have written down another. Such blunders are seldom made; applications for the correction of errors would be rare indeed, if nothing else were an available title to equitable interference. It is sufficient that the fact mistaken was an immediate part of the transaction; and as it was so here, there is nothing to show that the plaintiff ought not to recover.

Judgment accordingly.

Cited by Counsel, 4 Wh. 123; 5 Wh. 107; 3 W. 184; 4 W. 290.

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[*341]

The Commonwealth for the Use of Reynolds *against* Stremback and Others

Whether, where an execution is levied upon all the goods and chattels of an inn-keeper, consisting of a variety of household and kitchen furniture, and, also, of a quantity of liquors and bar furniture, which are suffered to remain in his possession between thirteen and fourteen months before any step is taken to effect a sale, it retains its lien, *dubatur*.

If a plaintiff, after having levied an execution on personal property, directs the sheriff 'to stay proceedings until further orders, the levy to remain,' the lien of the execution is gone, as respects third persons, whether purchasers or execution creditors, if the object of the arrangement was a security for the debt; and it is of no consequence whether the execution be returned or not, or whether or not third persons had notice of it.

THIS cause was tried before Judge Rogers at Nisi Prius, when a verdict was rendered for the defendants.

It now came before the court on a motion for a new trial, founded on an alleged misdirection of the judge to the jury, and was argued by *Wheeler* for the plaintiff, and *Miles* and *Bradford* for the defendants.

The opinion of the court, which contains a statement of all the material facts, was delivered by

ROGERS, J.—This was a *scire facias* on a sheriff's recognisance. The plaintiff assigns for breach of the recognisance, that the sheriff did not, according to law, well and truly execute all writs and process of the Commonwealth, to him directed, in this, that he refused to execute a writ of *fieri facias*, which had issued at the suit of William Reynolds against a certain Aaron Clements. The facts, so far as they are at present material, were as follows: To the March Term, 1828, William Reynolds obtained a judgment against Aaron Clements for two thousand four hundred and forty-seven dollars and forty-seven cents, on a bond.

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with a warrant of attorney, conditioned for the payment of one thousand and seventy-three dollars and seventy-four cents. A *fiery facias* was issued to the June Term, 1828, which was delivered to the sheriff on the 1st of April, 1828. On the 10th of April, 1828, the sheriff's deputy made this memorandum, which he attached to the writ, "Levied on all the goods and chattels of Aaron Clements, now in his possession, at the sign of the Indian Queen, South Fourth street, consisting of a variety of household and kitchen furniture, together with a quantity of liquors and bar furniture."

It appeared in evidence, that the judgment was entered, and the execution issued in consequence of Clements' default in the payment of an instalment of two hundred dollars a year, which he had agreed to pay in liquidation of the debt. After the levy [342] Clements called on *Mr. Wheeler, who was Reynolds' attorney, and expostulated with him, alleging that the levy would cause his ruin. They then entered into an arrangement, that Clements should give two notes for one hundred dollars each, payable in sixty and ninety days; whereupon the plaintiff's attorney gave the following order to the sheriff.

"Sir,—Please to stay proceedings until further orders. Levy to remain.

"Phila. 14 April, 1828.

yours,

"CHARLES WHEELER."

These notes, viz., the notes for one hundred dollars each, were duly paid; but in the following year Clements had to pay another sum of two hundred dollars, arising out of the same transaction, for which he again gave two notes, which have not been paid. After failure of payment, a bond of indemnity, dated the 29th May, 1829, was delivered to the sheriff, and Mr. Wheeler gave him, first a verbal, and then a written order, dated the 11th June, 1829, to proceed on the *fiery facias* issued on Reynolds' judgment. The sheriff refused to execute the writ, alleging that the levy had remained too long; that there was an order to stay proceedings, and that there had been an assignment to assignees, who were entitled to the property.

Clements executed two assignments in trust for certain specified creditors. One dated the 3d of May, 1826, to Benjamin S. Bonsall, Thomas Cooper, and Charles Champion. The other dated the 13th of May, 1829, to Peter Wager and Benjamin S. Bonsall. On the second assignment, an inventory was filed, and a bond given according to the directions of the act.

The plaintiff asks for a new trial on the ground of misdirection in the charge to the jury in this, that if the second assign-

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ment was good, it was of no manner of consequence, whether the assignees, or those claiming under them, had or had not notice of Reynolds' execution and levy, because of the order to stay proceedings; that the direction for the levy to remain, would be of no effect against them.

2. That the lien of Reynolds' execution was waived in favour of Palmer's execution, by reason of the order to stay proceedings, notwithstanding the direction for the levy to remain.

As both points involve the same principles, the correctness of the charge might be rested on the effect of the order to stay proceedings, but I think it proper to notice some other matters connected with the case. The levy was made on the 10th of April, 1828, and it was not until the 30th of May, 1829, that Mr. Wheeler gave a verbal order, and on the 11th of June, 1829, a written order to proceed, so that for thirteen or fourteen months the goods were suffered to remain in the possession of Clements, without any step having been taken to effect a sale. In England the practice is to remove the goods, and the fact that they are not removed, is a badge of fraud, so as to render them liable to a subsequent execution, or to pass into the hands of a purchaser, discharged from the lien of the execution creditor. In this state we have departed from the strictness of the *English rule. It is not the practice to remove goods and the fact, that they are not so, is not a badge of [*343] fraud. There is no certain rule, how long they may with safety to the execution creditor be permitted to remain in the possession of the debtor. The cases have varied from one day to upwards of two years. *Levy v. Wallis*, 4 Dal. 167; *Chancellor v. Phillips*, 4 Dal. 213; *Waters Ex. v. McClellan et al.*, 4 Dal. 208. But *vide* *United States v. Conyngham*, 4 Dal. 358. The departure from the English rule is said to have arisen from sentiments of humanity and the peculiar necessities of the country; and in *Chancellor v. Phillips*, Chief Justice Shippen says, "There is an obvious and material distinction between a levy on household furniture and on merchandise, or goods for sale. In the former case, the court has never allowed the plaintiff to lose the lien of a prior execution levied, because on principles of humanity he allowed the furniture to remain on the premises in the possession of the defendant. But it would be going farther than the reason of our decisions, and might introduce collusion and fraud, if we were to authorize or countenance such a practice indiscriminately in every case." We would not wish to be understood as attempting to impair the force of the earlier decisions, but it is necessary to inquire whether this be a case, which comes within the reason of the exception. Here there was a levy on all the goods and chattels of an inn-keeper, consisting of a va-

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riety of household and kitchen furniture, and also a quantity of liquor and bar furniture. There is no pretense to say, that part of the articles, on which the levy was made, came within the reason of the exemption of household goods. The beds on which he lodges his customers, with the liquor and food he supplies them, are the implements of his trade, the means by which he carries on his business, and no more entitled to protection on principles of humanity, or the peculiar necessities of the country, than the goods of the merchant, or the tools of the tradesman and mechanic. All the furniture of the house, except so much as may be necessary for the accommodation of the family, in a public inn, is intended for the same purpose. And how far and to what extent household furniture may be permitted to remain with the debtor, without the legal consequences which attend property of a different description, has not yet been decided. The principle has heretofore been laid down generally, that the act of suffering household goods to remain in the hands of the defendant after they are levied on, furnished no presumption of fraud here, as it did in England. Whether this extends to all a debtor's furniture, however valuable, without limitation, may perhaps, some day be worthy of serious investigation. The exemption of any species of property is to be regretted, as every day's experience shows, that it tends to produce collusion and fraud. That there should be some limit, I think apparent, and what it may be, will be for the court to determine when the question arises.

I will now consider the effect of the order to stay proceedings, the levy to remain. As between Clements and the execution creditor the lien remained, for that was the contract [*344] as appears from the testimony and from the order itself. But if the intention of the parties was fraudulent, or the object of the arrangement was a security for the debt, the lien of the execution was gone as respects third persons, whether purchasers or execution creditors. The object of an execution is the satisfaction of the debt, and not security for it. The law will not endure the levying an execution on goods only as a security. 1 Wils. 44; *Bradley v. Wyndham*, 8 Serg. & Rawle, 510. Suffering goods, which are levied on, to remain in the possession of the debtor under an arrangement such as the present is fraudulent *per se*, as against the policy of the law. And from this it results, that it is of no consequence, whether the execution is returned or not, or that third persons had notice of the agreement, that the levy should remain. The rule is intended to prevent fraud, and this can be most effectually done, by treating the property in the same manner as if no levy had in fact been made. It is sufficient for a purchaser or execution creditor to know, that

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the execution is not intended to obtain satisfaction, but that the purpose of the levy is a mere security for the debt. The court will not inquire whether in fact there was fraud or not. It is an inference of law, which cannot be rebutted, which constitutes the levy so far as respects third persons, fraudulent *per se*. If this should be permitted, I cannot perceive, how it would differ from a mortgage of personal property, the mortgagor retaining the possession. And that a mortgage of goods, with possession retained by the mortgagor, is fraudulent in law, has been decided in England and in this country. To give a creditor priority by such a mortgage, when the mortgagor is allowed to appear and act as owner, is enabling him, as is said by Lord Mansfield, in *Worseley v. De Mattos*, 1 Burr. 467, and by the present Chief Justice in *Clow v. Woods*, 5 Serg. & Rawle, 275, to impose on mankind by false appearances. A question, similar in every essential feature to this, came before the court in *Eberle v. Mayer*, 1 Rawle, 366, and it was there held, that an order by an execution creditor to the sheriff, to stay all further proceedings on his execution at his risk, until further directions, is a waiver of his priority in favour of a second execution received by the sheriff during the continuance of the stay. It is true as is there said, that merely leaving the property in the possession of the defendant in the execution, though with the plaintiff's consent, is not *per se* fraudulent, either as to subsequent creditors or purchasers, but where the plaintiff directs the sheriff to delay the execution or sale, the law is otherwise, *Berry v. Smith*, 3 Wash. C. C. Rep. 60, is, if possible, still nearer the point. The change of possession, as was there said, gives notice to all the world of the real situation of the debtor in relation to the property, so seized, and prevents them from being deceived by the appearance of wealth, to which the debtor has no just pretensions. If the execution is delivered to the officer with orders not to levy it at all, or until further orders, the purpose of the delivery is not answered, and *all the legal consequences of the measure, in respect to creditors and pur- [*345] chasers, who would otherwise be affected by it, would be defeated. If the officer is ordered to levy on, but to leave the property with the owner, until he shall be otherwise directed, the party undoes by such an order all the officer does by the seizure; it works no change of property; it is no levy in respect to third persons.

It has been seen, that in Pennsylvania it is not necessary that the officer should remove the property, nor put a person in charge of the goods, nor sell them immediately, if this be done in a reasonable time. I would not, however, think it safe for creditors, at this day, when the condition of the country has so materially changed, to permit the levy to remain without sale of the

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goods, or some person having them in charge, so long a time as would seem to be authorized by the earlier cases. Here the judge, who tried the cause, left it as a fact for the decision of the jury, whether this transaction was intended as a security for the debt, and it would be difficult to imagine, how the jury could have come to a different conclusion from that which they did. It is manifest that the levy was to remain in the nature of a security for the debt.

Motion for a new trial overruled, and judgment on the verdict.

Cited by Counsel, 4 R. 265; 1 Wh. 122; 5 Wh. 123, 152; 9 W. 334; 10 W. 214; 2 W. & S. 254; 3 W. & S. 286; 7 W. & S. 66; 8 W. & S. 457; 9 W. & S. 74; 4 Barr, 155; 10 Barr, 396; 1 H. 427; 1 C. 147; 1 G. 167; 4 Wr. 246; 14 S. 444.

Cited by the Court, 4 R. 380; 5 R. 290; 7 W. 77; 9 Barr, 503; 1 H. 412; 6 H. 445; 6 N. 167, s. c. 6 W. N. C. 264; 11 N. 261.

[PHILADELPHIA, FEBRUARY 2, 1832.]

Flagler against Pleiss.

IN ERROR.

Parol evidence is admissible to prove, that by the original contract for the sale of a lot of ground then inclosed by a fence, the whole was intended to be embraced, but that the vendor fraudulently omitted a part of it in the articles of agreement and deed subsequently executed between the parties.

ERROR to the District Court for the city and county of *Philadelphia*.

The plaintiff in error, Mary Ann Flagler, was plaintiff below in an ejectment against John M. Pleiss to recover four feet of ground, alleged to have been sold to her by him as part of a lot of ground with the messuage thereon erected, at the south-east corner of Garden and Callowhill streets, and fraudulently omitted in the articles of agreement entered into between them on the 20th of May, 1826, and in his deed to her, of the 12th of the following June. The error assigned in this court was the rejection, by the court below, of evidence offered for the purpose of proving the alleged fraud.

[*346] *After argument by *Norris* for the plaintiff in error, and *Rawle* for the defendant in error, the opinion of the court, in which the circumstances of the case are sufficiently stated, was delivered by

GIBSON, C. J.—This is a plain case. A purchase is made of

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a lot which at the time, is inclosed. The inclosure contains in depth fifty-one feet, but the lot without having been measured by the purchaser, is described in the articles as well as in the conveyance, as containing but forty-seven. The purchaser takes possession of all within the inclosure, but the vendor subsequently removes the fence so as to exclude four feet of the original lot, insisting that the purchaser still has all that her conveyance calls for. The purchaser brings an ejectment, and offers parol evidence of the circumstances and original terms of the bargain, which is rejected, because the terms have been reduced to writing and consummated by the acceptance of a conveyance. If deception and practice on the plaintiff's ignorance throughout the course of the business, were not alleged, the deed would undoubtedly be satisfaction of all previous stipulations, and parol evidence could not be given to contradict it or the articles. But it was surely competent to the purchaser to show that there was fraud and deception throughout, as well as in the preparation of the articles as of the deed, and that she was drawn in to execute the one, and accept the other, through artifice and ignorance of the fact, that they described the property falsely, and not as she had purchased it. It is no objection to say, that as she might have had the contents of the ground ascertained beforehand, she was bound to judge, whether the writing included all that met the eye. It is but a poor excuse for an advantage taken, that the probity of him who has practised it, was imprudently confided in. It would be improper to forestall the opinion of the jury, before whom the cause is to come, and it is therefore remitted to the court below, simply with a direction in favour of the competency of the evidence.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 5 Wh. 458; 4 W. 290; 9 W. 267; 2 W. & S. 49; 5 H. 458; 4 C. 415; 1 G. 88; 3 G. 55; 8 Wr. 393.

Commented on, 3 G. 279, and approved, 2 Barr, 124.

Cited by the Court, 5 Barr 410 · 10 H. 244.

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*[PHILADELPHIA, FEBRUARY 2, 1832.]

Shronk, Executor of Shronk, *against* the Supervisors of the Public Roads and Highways of the Unincorporated Part of Penn Township.

IN ERROR.

The fourth section of the act of 6th April, 1802, prescribing the mode of proceeding against delinquent supervisors of public roads and highways, does not extend to the executors of such delinquents.

Although a township is not strictly a corporation, it is *quasi* a corporation, and as such may maintain a suit.

ERROR to the District Court for the city and county of *Philadelphia*.

The defendants in error, who were plaintiffs below, brought this action on the case against George Shronk, executor of Godfrey Shronk deceased, in which they filed a declaration containing three counts.

The first count was for money had and received by the testator to the use of the plaintiffs below.

The second count was upon an account stated between the plaintiffs below and the defendant as executor of Godfrey Shronk, concerning divers sums of money due and owing by the said Godfrey Shronk in his lifetime to the plaintiffs below, upon which account the said Godfrey Shronk was found to have been in arrear to the plaintiffs below in the sum of four hundred and ninety-eight dollars and seventy-three cents, which the defendant below as executor promised to pay.

The third count was as follows, viz. :—"And whereas the said Godfrey Shronk since deceased in his lifetime heretofore, to wit, from the fourteenth day of April in the year of our Lord one thousand eight hundred and twenty-three, to the first day of November in the year of our Lord one thousand eight hundred and twenty-seven, was the supervisor of the public roads and highways of the unincorporated part of Penn township in the county aforesaid, and has as such received divers large sums of money, to wit, the sum of six hundred dollars of like lawful money which he the said Godfrey Shronk should have appropriated and expended for and towards the defraying of the expenses incident to the keeping the said public roads and highways in repair ; and whereas also afterwards, to wit, on the fourteenth day of March in the year of our Lord one thousand eight hundred and twenty-eight, at an election for choosing a super-

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visor for the said unincorporated part of the said township, four capable *and discreet freeholders or inhabitants were elected, to wit, John F. Warner, George Esher, Robert Watkins, and Joseph R. Hopkins, whose duty it was to settle and adjust the accounts of the said Godfrey Shronk deceased, he in his lifetime, to wit, during a part of the preceding year, having served in the office of supervisor of the public roads and highways of the unincorporated part of the said township, and the said George Shronk as executor as aforesaid having produced the accounts of the said Godfrey Shronk for all sums of money by him expended on the highways and of all sums of money by him received, the said freeholders or inhabitants so chosen to settle the accounts aforesaid, did adjust and settle such accounts so produced to them as aforesaid and allowed such charges as they thought reasonable, when there appeared to be due from and remaining in the hands of the said George Shronk as executor as aforesaid the sum of four hundred and ninety-eight dollars and seventy-three cents, for which sum they, the said freeholders, gave their order in writing signed by them, and directed the same to be paid to Samuel Deal, the succeeding supervisor of the said unincorporated part of the said township, according to the act of assembly in such case made and provided, and the said George Shronk as executor as aforesaid in consideration thereof afterwards, to wit, on the first day of June in the year of our Lord one thousand eight hundred and twenty-eight, at the county aforesaid undertook and then and there faithfully promised the said plaintiff, that he, the said George Shronk as executor as aforesaid, would well and truly pay and satisfy the said plaintiff the said sum of four hundred and ninety-eight dollars and seventy-three cents, lawful money as aforesaid, when he should be thereunto afterwards required, yet," &c.

The defendant pleaded *non assumpsit*, payment and set-off; *non assumpsit*, payment and set-off by the testator; no assets and *plene administravit*, with leave to add, alter, and amend.

The jury found a verdict in favour of the plaintiffs for five hundred and forty-three dollars and forty-nine cents, upon which, after motions for a new trial and in arrest of judgment had been overruled by the court below, judgment was entered.

The defendant removed the cause by writ of error to this court, where the following errors were assigned:—

"*First*. The township is unincorporated, and has no right to sue, nor can it be sued, nor had the supervisors thereof any authority to bring this action.

"*Second*. The declaration is informal and insufficient in this, viz.:—

"1. The first count avers, that the testator in his lifetime was

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indebted to the plaintiffs for money received by him for the use of the plaintiffs: whereas the money received by the testator was to his own use and not to the use of the supervisors who brought this suit; the supervisors last mentioned having no existence until after the death of the testator, as appears by the third and last count in the *narr.*

[*349] *²“ 2. The second count avers, that the executor accounted with the defendants in error about money due from the testator to the said defendants in error in his, the testator's lifetime; whereas the testator could not have owed those who had no existence until after his death.

“ 3. The third count avers, that upon the settlement therein mentioned, a balance of four hundred and ninety-eight dollars and seventy-three cents was found in the hands of the executor, whereas the balance, if any, was against the testator and not his executor.

“ 4. The *narr.* contains no averment, that the testator ever assumed or promised to pay any one, or that in consequence of any matter declared upon the testator ever became liable to pay any sum of money to any one, or that in pursuance thereof a right accrued to any one to have or maintain any action against the testator or his executor.

“ 5. The only claim laid in the declaration against the testator is in his capacity of supervisor, whereas the action is brought against or names him in his individual capacity only.

“ *Third.* The last count in the *narr.* exhibits the whole claim of the defendants in error, embracing in a settlement therein mentioned, amounts, over which the settlers had no control.

“ *Fourth.* The settlers had no authority to settle the accounts of a deceased supervisor.

“ *Fifth.* The declaration avers, that the executor promised to pay Samuel Deal on an order in his favour on the said executor by the said settlers. The settlers had no authority to give this order. Deal was not plaintiff, and no recovery could be legally enforced on a promise to one not plaintiff to the action.

“ *Sixth.* The claim set forth in the *narr.* cannot be recovered in an action of *assumpsit*. The only remedy being that prescribed by the act of assembly of the 6th of April, 1802.”

After argument by *Brewster* for the plaintiff in error, and *K. Smith* and *J. R. Ingersoll*, *contra*, the opinion of the court was delivered by

ROGERS, J.—The plaintiff in error has filed several exceptions, two of which only will it be material to notice. I shall content myself with dismissing the others with the remark, that they have not been sustained. I refer to the first error, and to

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the exceptions to the third count of the plaintiff's declaration, which involves the question, whether the executors come within the purview of the fourth section of the act of the 6th of April, 1802. That section gives a summary remedy against delinquent supervisors, *eo nomine*, but says nothing about executors, who are left as at common law. The act provides for the election of four freeholders, whose duty it is to settle and adjust the accounts of the supervisor, whose term of office is about to expire. It also directs the supervisors on the 25th March yearly, or within ten days thereafter, to produce fair and clear accounts of all the sums of money, which have been by him expended *on the highways, &c., which accounts shall be entered [*350] in a book provided for that purpose, and if required, attested by oath or affirmation. In this part of the section the legislature have clearly a view to the supervisor himself. They prescribe duties, of which he alone would be properly cognizant, and which it would be unreasonable to require of an executor; but the remedy which is given to the township against the supervisor cannot be made by any fair mode of interpretation to apply to executors, and might, if enforced against them, interfere with the distribution of the assets among creditors. If the supervisor shall refuse or neglect to make up and produce clear and just accounts, or having made up and produced such accounts, shall neglect or refuse forthwith to pay the moneys, which he shall have been ordered to pay by the freeholders, or to give up the books, &c., it shall be the duty of any justice of the peace, on complaint made to him, &c., to commit such delinquent to the county gaol, until he shall comply, or be otherwise discharged. We must take the whole section together, and it is difficult to believe, that a remedy so summary and penal, without appeal, can apply to any person but the delinquent supervisor himself. If the representatives of the delinquent were to be amenable to the jurisdiction of the freeholders, the legislature would have taken care to have said so, in clear and explicit terms. In the absence of any thing of the kind in a section, which throughout speaks of the delinquent supervisors alone, we cannot attribute to them any such intention. Here the freeholders summoned the executor to appear, and the object of the suit, as stated in the third count, is to compel payment of the amount of the audit. It matters not that the executor appeared before the freeholders without objection. Consent cannot give jurisdiction.

The plaintiff in error also alleges, that the defendant in error had no legal authority to bring this action. The township is unincorporated, and has no right to sue, nor can it be sued, nor had the supervisor any authority to bring this action. This is not the first time the right of a township to sue has been ques-

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tioned, as appears from the case of *Willard v. Parker*, 1 Rawle, 450. We then thought, as we now do, that although a township is not strictly a corporation, yet it is *quasi* a corporation, and as such may maintain suit. The same principle has been extended to counties in recent decisions.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 7 W. & S. 269.

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*[PHILADELPHIA, FEBRUARY 2, 1832.]

Penrose by His Guardian Hutchinson *against* Curren.

IN ERROR.

An infant, who hires a horse to go to one place, but goes to another, and kills the animal by severe usage, may plead his infancy in bar of an action on the case for damages.

ON a writ of error to the District Court for the city and county of *Philadelphia*, this appeared to be an action on the case brought by William Curren, the defendant in error, against Samuel Penrose, who appeared by his guardian Randall Hutchinson, in which the plaintiff below filed the following statement:

"On Saturday the 2d day of June, 1827, the defendant hired from the plaintiff a horse and gig to go to Germantown on the following day. On the following day, to wit, June 3d, 1827, the defendant took the said horse and gig and rode and drove to Chester in Delaware county, and to other places to the plaintiff unknown, and by hard, severe, unnecessary, and cruel driving and treatment killed the said horse on the said 3d day of June, 1827. The plaintiff's claim is for this injury to his property, and he claims damages in the sum of one hundred and twenty-five dollars."

The defendant pleaded "infancy," and that "he is not guilty of the supposed grievances laid to his charge," &c.

The jury returned a special verdict, by which they found, that all the allegations contained and set forth in the plaintiff's statement of his cause of action were true, and that the defendant at the time of committing the said trespass mentioned in the said statement, was under the age of twenty-one years. If the court should be of opinion that the defendant was legally responsible in this form of action, and under these facts, the jury found for the plaintiff, and assessed the damages at one hundred

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and twenty-five dollars, with six cents costs, and if otherwise they found for the defendant.

On this special verdict, the District Court gave judgment for the plaintiff below.

Bouvier, for the plaintiff in error.—The statement filed by the plaintiff below, which is in the nature of a declaration, is upon a contract for hiring a horse to be returned to the owner, which the defendant failed to do, but killed him by hard driving. Upon the contract, the defendant was not liable, being in his minority, and the subject-matter of the contract, not being necessities furnished to him. The plaintiff now attempts to render the infant liable by converting an action *ex contractu* into an action *ex delicto*. This he *cannot do. Where goods [*352] are delivered to an infant, knowing him to be such, trover cannot be maintained. *Manby v. Scott*, 1 Sid. 129. So where a plaintiff declared, that at the defendant's request, he had delivered to him a mare to be moderately ridden, and that the defendant maliciously intending, &c., wrongfully and injuriously rode the mare, so that she was damaged, &c., it was held that the defendant might plead his infancy in bar, the action being founded on a contract. *Jennings v. Rundall*, 8 T. R. 335. The defendant being an infant, affirmed himself to be of full age, by which means he obtained a loan of one hundred pounds of the plaintiff. After verdict for the plaintiff, on not guilty pleaded, the judgment was arrested. *Johnson v. Pie*, 1 Keb. 905, 913; s. c. 1 Sid. 258; 1 Lev. 168. An infant cannot be made a trespasser either by a prior command or subsequent assent. Co. Litt. 180, b, note 4. It is against the policy of the law to make an infant liable upon a contract, except for necessities, and the law will not permit it to be done indirectly by converting the contract into a tort. *Curtin v. Patton*, 11 Serg. & Rawle, 310; 1 Com. on Cont. 150, 151; *Schenk v. Strong*, 1 South'd, 87.

Brewster, for the defendant in error.—If an action such as this cannot be maintained in the English courts, it can in those of Pennsylvania. In England the courts uniformly favour infants, perhaps to preserve wealth in particular families; a reason which can have no influence here. The case in Southard was decided on the ground that the carriage was broken by accident, which distinguishes it in an essential manner from the case at bar, the basis of which is fraud and tort. There was fraud in the inception of the contract, and the defendant cannot shelter himself under the form of contract to avoid the consequences of the fraud. Infants are liable for deceit, though in form the

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action is on a contract; *assumpsit* will lie against an infant for money embezzled by him. So an action may be maintained against an infant on a warranty of a horse. The court will look through the form in order to get at the merits of the case. *Wood v. Vance*, 1 Nott & M'Cord, 197; *Horner v. Twining*, 3 Pick. 492; *Vasse v. Smith*, 6 Cranch, 226.

The opinion of the court was delivered by

ROGERS, J.—The law has wisely provided, that infants shall not be liable on contracts, except for necessities. It cannot be pretended, that here the infant would be liable on the contract of hiring, as the plaintiff has not brought his case within the principle of the exception. The plaintiff rests his right to recover on the fact, that the minor was guilty of a conversion by riding to Chester instead of Germantown. He contends, that wherever trover is the proper form of action, it will lie as well against an infant as an adult, and in this position, it must be admitted, he is supported by a decision of a court of high authority in *Horner v. Twining*, 3 Pick. 492. I have examined that case with the attention it merits, and I am compelled to [*353] say, I cannot agree to the principle, which is there decided. It is true, that *detinue* will lie against an infant for goods delivered upon a special contract for a specific purpose, after the contract is avoided. It is also true, that *assumpsit* will lie against an infant to recover money embezzled. To this I fully accede, because the object of the suit, in the first case, is to recover the article itself, or damages for its detention. And this decision is founded in sheer justice, as the privilege of protection is given to the minor as a shield, and not as a sword, nor is it necessary for its safety, that he should be permitted to retain the article, when the contract has been rescinded, without paying an equivalent for it. The vendor is remitted to his original rights, when the contract has been rescinded, and as a consequence, he may assert them, either by action of *detinue*, *replevin*, or *trover*. It is also altogether proper, that money embezzled by an infant, should be recovered in *assumpsit*. The occupation, in which he is employed, is for the benefit of the infant, and the embezzlement is a tortious act, in which no blame is imputable to the employer. But is that the case here? The infant derives no benefit from the transaction, and what is of more consequence, the plaintiff himself is in fault. The loss which ensues results from the contract of hiring with a person whom he is bound to know was a minor, and as such incapable of contracting. This is a transaction in which parents and guardians have a deep interest, and particularly such as educate their children from under their own eye at a distance in our

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seminaries of learning. It amounts to this: If the keeper of a livery-stable, or an inn-keeper, whose business it is to let out horses and carriages to hire, chooses to trust them to a minor, contrary to the assent and wish of the parent, and an injury is done by the young man, in the folly and heedlessness of youth, going to a different place, or further than he intended, the father must either pay the debt or damages to whatever amount they may be, or suffer his child to be disgraced by imprisonment. It seems to me, that parents would have much reason to complain of a rule, which involves such consequences. If the plaintiff should succeed, there would be no want of pretences, upon which infants might be charged, and there would be an end to the protection which the law so wisely affords them. I cannot agree, that from the commission of a wrong, a right of action can arise. If the contract of hiring came within the exception of necessities, as might be, where a horse was hired to visit a sick parent, &c., then the infant would be liable for the consequences, and if injury ensued from cruel driving, or improper treatment, the owner would have an appropriate remedy.

Had the minor gone to Germantown as he intended, then *Schenk v. Strong*, 1 Southard, 87, would have been express authority, adverse to the plaintiff's claim. The foundation of the action is contract, and disguise it as you may, it is an attempt to convert a suit, originally in contract, into a constructive tort so as to charge the infant. So far are minors shielded from the consequences of their own acts, that action [*354] will not lie against them, where they affirm themselves to be of full age, nor on a warranty in the sale of a horse, *Johnson v. Pie*, 1 Lev. 169; 1 Keble, 905. Nor will, I apprehend, trover lie against an infant for goods sold to him, either with or without a knowledge of his infancy; certainly not where he knows the fact of infancy, *Manby v. Scott*, 1 Sid. 129. The contract being unlawful, no action arises to the adult, who is bound to know with whom he is contracting, and must be aware that such contracts are contrary to the policy of the law. It operates not only as a shield to the infant, but as a penalty upon the adult.

Wherever a person has not parted with the property, then he can assert his right, as well against an infant as an adult, as in every kind of bailment; and if the conversion had been the non-delivery of the horse and carriage hired, the owner might have sustained detinue, replevin, or trover. I would here remark, that notwithstanding what is said in *Horner v. Twining*, I cannot distinguish this from *Jennings v. Rundall*, 8 T. R. 335. In the second count of the declaration, it was alleged that the plaintiff let to hire and delivered to the defendant a certain other

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mare to go and perform a certain reasonable and moderate journey, &c., and yet that the defendant, contriving, &c., wrongfully and injuriously rode and worked the said mare a much longer journey, &c. The defendant pleaded infancy to both counts, to which the plaintiff demurred. Here then there was the constructive conversion of the property, which is the turning point of the decision in *Horner v. Twining*, and yet the court notwithstanding gave judgment for the defendant. The fundamental error seems to me to consist in considering the conduct of the infant as a violation of contract, whereas there was no contract, which could be enforced.

Judgment reversed, and judgment for the defendant.

Cited by Counsel, 4 W. 80; 10 W. N. C. 110.

Cited by the Court, 6 W. 12; 3 Wr. 302; 12 Wr. 501.

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*[PHILADELPHIA, FEBRUARY 2, 1832.]

Smyth against Hawthorn.

IN ERROR.

The indorser of a promissory note cannot contest the right of a surviving partner to sue upon it as such, and call upon him to show the consideration he paid for it, or the manner in which it came into his possession, upon an allegation that it belonged to the deceased partner in his individual capacity, where it does not appear that the administrator of the deceased partner denies that the interest is vested in the plaintiff as surviving partner; and even if the note did belong to the deceased partner in his individual right, the presumption is, in the absence of proof to the contrary, that the plaintiff came honestly by it for a full and valuable consideration.

It is sufficient proof of the delivery of a notice, that it was sent in a letter by the post, without proving that the letter was received; provided the delivery be on the day, on which the notice should be given.

A duplicate original, or copy of a notice is good evidence without notice to produce the original.

And where a written notice has been given, but no duplicate or copy kept, it is not requisite to give notice to produce the notice.

Where a promissory note became due in New York on Saturday when it was protested, and on the following Monday the notary inquired, where the defendant, who was the first indorser, resided, of a subsequent indorser, who only knew that he resided out of the city of New York, and went to a former holder of the note to obtain information, and on the following day notice of the dishonour of the note was sent through the post-office to the defendant in Philadelphia, Held, that the notice was sufficient to render the defendant liable.

What is sufficient notice to an indorser of the dishonour of a promissory note, and what dispenses with notice, when it has not been given.

ON a writ of error to the District Court for the city and county of *Philadelphia*, it appeared that this action was brought by the defendant in error, John N. Hawthorn, as surviving

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partner of the late firm of M'Clintock, Hawthorn & Co., to recover the amount due upon a promissory note, drawn by John G. Gannon in favour of, and indorsed by John Smyth, the defendant below and plaintiff in error, for three hundred and sixteen dollars and twenty-five cents, dated New York, February 9th, 1826, and payable six months after date.

On the trial in the court below the plaintiff offered in evidence the depositions of William Seaman and John M'Quade, to prove that he had received the note in question from M'Clintock after the dissolution of the partnership; that a letter had been written by M'Quade to the defendant below, and put into the post-office at New York on the 15th of August, 1826, directed to the defendant in Philadelphia, informing him that the note had not been paid, and that it had been returned by M'Quade to M'Clintock. This evidence was objected to by the counsel for the defendant, because no notice had been given to him to produce the letter, and because the contents and words of the letter were not set forth in the depositions.

*The judge before whom the cause was tried overruled the objection, and admitted the evidence, which was the [*356] first error assigned in this court.

The defendant below then produced and gave in evidence a letter from the plaintiff below to him, dated October 30th, 1826, in which the plaintiff declared, that he was the legal representative of M'Clintock then deceased, and another letter from the plaintiff to him dated 5th April, 1827, in which he declared that the firm of M'Clintock, Hawthorn & Co., had been dissolved on the 9th of November, 1825. The defendant further proved, that after the dissolution of the firm, M'Clintock continued to reside in New York, and transact business on his own separate account; that he received consignments from the defendant, and transacted business with him, and that he died in the month of September, 1826. After having established these facts the defendant gave in evidence two notices to the plaintiff to prove the consideration paid by him for the said note, and the manner in which it came into his possession.

The plaintiff then proved that M'Clintock was largely indebted to the firm of M'Clintock, Hawthorn & Company, and also produced a statement in the handwriting of the defendant, as follows, viz.:

Balance due by M'Clintock, Hawthorn & Co., as	
furnished,	\$ 20.39
J. G. Gannon's note,	316.25
	<hr/>
	336.64

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	\$336.64
Cash received at sundries,	310.53
	<hr/>
	26.11
J. G. Gannon's note protested,	316.25
	<hr/>
	\$290.14

The counsel of the defendant contended in the court below, 1. That the note in question had been passed to M'Clintock individually, after the dissolution of the firm of M'Clintock, Hawthorn & Co., and could not be recovered by the plaintiff as surviving partner.

2. That under the circumstances of the case, it was necessary for the plaintiff to prove the consideration paid by him for the note, and the manner in which it came into his possession.

3. That sufficient legal notice had not been given to the defendant of the non-payment of the note by the maker.

His Honour instructed the jury substantially as follows:— That the note, on which this action was brought, was a note with a blank indorsement to which the law attributed a character of the most sacred kind: That it was of the utmost importance to the commercial world that a note of this kind should pass free and untrammelled from hand to hand, and that if it were not so the operations of business would be greatly impeded: That the law permits a note with a blank indorsement *to pass [*357] by delivery even after it had been dishonoured, but in that case the holder takes it subject to all defences to which it would have been subject to in the hands of the payee: That “the possession of the note by the plaintiff in this instance was sufficient *prima facie* to entitle him to recover, and the defendant cannot call upon the plaintiff to prove the consideration paid and the manner in which the note came into his possession, without a ground of suspicion having been first made to appear, which has not been done on the part of the defendant in this case; the plaintiff's possession of the note is therefore in this respect sufficient to entitle him to recover, if he can make out his case in other respects. But the holder of the note when due is bound to make a demand for payment on the maker, and upon his neglect or refusal to pay to give notice thereof to the indorser in a reasonable time, and though the indorser may not be able to show that he has suffered, because of the holder's delay in giving him notice, he may still stand upon his rights, and if he has not received such timely notice as the law says he is entitled to, he is discharged, and your verdict must be for the defendant. Is that the case here? The maker had the whole of the 12th of

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August, the last day of grace, to take up the note; the 13th was Sunday; on Monday the 14th of August, if the indorser had come forward, his contract would have been complied with; Monday was therefore the first day on which the indorser was liable. It is very true, that strictly speaking, notice should generally be sent by the next mail. The law requires that the holder should use due and reasonable diligence. This is a question of fact for your decision, and must depend upon the special circumstances of the case. Mr. Seaman, the notary, on Monday morning, inquires of M'Quade as to the place of the defendant's residence. M'Quade only knew that he resided out of the city of New York, but did not know where; and goes to receive information from M'Clintock; the same day he goes to Gannon's house again to demand payment. This was an act of favour to the indorser of which he cannot reasonably complain. And on the next day, viz., Tuesday, the 15th, he puts into the post-office a notice to the defendant residing here. Was this reasonable diligence? I leave it to you to judge, under all the circumstances of the case. The defendant denies that he ever received such notice. If the notice was put into the post-office in proper time, it is all the law requires. There is no proof of its mis-carriage; it rests on the defendant's assertion only. If it mis-carry, it is the defendant's misfortune, but the plaintiff in this case having done all the law required of him by putting it into the post-office, is not to be held responsible for it, if he put it in in proper time, which you will judge."

Errors were also assigned in this court in the charge thus given to the jury.

Chew, for the plaintiff in error, cited 1 Starkie, 357, 359, 371, 373; *Dennis v. Barber*, 6 Serg. & Rawle, 420; *Patton's Adm'r v. Ash*, 7 *Serg. & Rawle, 116; *Campbell v. Wallace*, [*358] 3 Yeates, 271; *M'Kee v. Reiff*, 4 Yeates, 340; *Whart.* [*358] Dig. 303, no. 375; *Smedes v. Utica Bank*, 20 John. Rep. 372; 3 Cow. 662; *United States v. Barker's Adm'x*, 4 Wash. C. C. Rep. 469; 12 Wheat. 559.

W. M. Meredith, for the defendant in error, cited 2 Phil. Ev. 19, 20; *Smith v. Bank of Washington*, 5 Serg. & Rawle, 322; *Stewart v. Allison*, 6 Serg. & Rawle, 329; 6 Wheat. 104; 13 John. Rep. 470; 3 Pick. 180; *Leazure v. Hillegas*, 7 Serg. & Rawle, 320; *Williams v. Smith*, 2 Barn. & Ald. 501; 1 Chitty on Bills, 279.

*The opinion of the court was delivered by
ROGERS, J.—The possession of the note was *prima facie*, suf-

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ficient to entitle the plaintiff to recover; and we fully agree with the District Court, that no circumstances of suspicion were exhibited which would make it necessary to prove the consideration paid, or the manner in which the note came into the possession of the plaintiff. This was the case of a note, indorsed in blank, which passes by delivery, so that possession is such evidence of title as to authorize a payment to the holder. This is a singular defence; the indorser undertakes to contest title to the note, when, so far as we judicially know, the administrators of M'Clintock do not pretend to deny, that the interest is vested in the plaintiff as the surviving partner of the firm of M'Clintock, Hawthorn & Co. Even if the note did belong to M'Clintock, in his individual capacity, (which is at least doubtful,) we are bound to presume, in the absence of a shadow of proof to the contrary, that Hawthorn came honestly by it for a full and valuable consideration.

It is sufficient proof of the delivery of a notice to show, that it was sent in a letter by the post, without proving that the letter was received, provided the delivery be on the day on which notice should be given. *Saunderson v. Judge*, 2 H. B. 509; *Scott v. Lifford*, 9 East, 347; *Smith v. Mullet*, 2 Camp. 208. The presumption is a fair one, that the letter reaches its destination in due time; and whether it does or not, this is all the law requires; it would be extremely inconvenient to require more. This has been admitted, and it has also been conceded, that where a duplicate original or copy of the notice has been kept, it is good evidence without a notice to produce it. *Kine v. Beaumont*, 3 B. & B. 288. And where a written notice has been given, but no duplicate or copy kept, it is not requisite to give a notice to produce the notice of dishonour. In *Ackland v. Pearce*, 2 Campb. 601, *Le Blanc, J.*, admitted parol evidence of the contents of the notice, without a notice to produce it, and the court refused a new trial. 7 B. Moore, 112; *Colling v. Treweek*, 6 B. & C. 394. It is true that in *Langdon v. Hulls*, 5 Esp. 156, a contrary doctrine was held, but I think, upon insufficient reasons. Where the letter has been received, there can be no danger in admitting parol evidence, without notice, as any mistake in the proof may be corrected by production of the original, and as notice is part [*359] of the plaintiff's *title, an indispensable prerequisite to recovery, in most cases, he may be presumed to be ready to do so. *Le Blanc* compares it with a notice by a landlord to his tenant to quit, which may be always proved, without notice to produce the original notice. If fraud is intended, this can be as well asserted by a simulated copy as by any other species of proof. Of this the jury must judge.

But it is said, that the notice was not in time to fix the in-

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dorser. The facts were these. This was a note dated New York, February 9th, 1826, at six months for three hundred and sixteen dollars and twenty-five cents, drawn by John G. Gannon in favour of, and indorsed by John Smyth. The note passed into the hands of M'Clintock and then to M'Quade; it was then deposited in bank for collection, and by them was presented for payment. The last day of grace was Saturday, the 12th August, when it was protested; the 13th was Sunday. On Monday the 14th the notary inquired of M'Quade, who was an indorser, and of course liable to the bank, where the defendant Smyth resided. M'Quade only knew, that he resided out of the city of New York, and went to receive information from M'Clintock. The next day, the 15th, he put the notice into the post-office at New York. The law is founded in reason, and does not require impossibilities; M'Quade could not give notice to Smyth until he had himself notice of the dishonour of the bill. The next day after he received the necessary information, notice was sent by the post to the defendant. It is of great consequence to the commercial world, that there should be some certain, precise, and fixed rule in relation to the time, when notice should be given. The general rule with regard to inland bills is, that where the parties do not reside in the same town, it is sufficient to send notice by the post of the day following that on which the party receives intelligence of the dishonour. *Williams v. Smith*, 2 B. & A. 497; 20 John. Rep. 372; 3 Cowan, 662; 4 Wash. C. C. Rep. 469. M'Quade an indorser, and as such liable to the bank, receives notice on Monday, the note having been protested on Saturday, Sunday intervening, and on the following day he sends by the post notice to Smyth. The holder of a protested bill is not bound to give all the parties to the bill notice; he may be satisfied with his immediate indorser. The law then allows him to give notice to others, when he may wish to render them liable, and it is in time to do so, the next day after he receives intelligence of the dishonour of the bill. And this is the principle of *Wright v. Shawcross*, reported in a note to *Williams v. Smith*, 2 B. & A. 501. The case was this. A bill had been drawn by P. B. on Messrs. L. R. & Co., and was dated the 1st June. It had been delivered without being indorsed by the defendant to the plaintiff. It was presented for payment in London on the 3d of April. On the 4th of April a letter was written to the plaintiff, informing him of it, which he received on the 6th of April, being Sunday. On the Tuesday evening notice by the post was sent to the defendant. The court held that the plaintiff was not bound to open the letter from London until Monday *morning, and that [taking him to have received notice of the dishonour at [*360]

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that time, he had done quite sufficient in transmitting it to the defendant by the next day's post. The bill was protested the third, and the notice was not put into the post-office until the 8th, notwithstanding which the court held the defendant liable.

The evidence in this case furnishes proof that notice of the dishonour of Gannon's bill was received, which was deemed sufficient. A statement of the accounts in the handwriting of the defendant shows this fact, which if the case needed it, would show that Smyth here dispensed with notice, and this defence was an afterthought, for which perhaps he is indebted to the ingenuity of his counsel. An acknowledgment by a drawer, who has become bankrupt, made after his bankruptcy that the bill would not be paid, will supersede the proof of notice. 13 East, 213, *Brett v. Levett*. So a letter from the drawer of an accommodation bill, stating that it would be paid before next term. *Wood v. Brown*, 1 Stark. 217. So a promise after dishonour of the bill to pay if the holder would call again. *Lundie v. Robertson*, 7 East, 231. So where the drawer of a foreign bill of exchange, on being told it was dishonoured, says that his affairs are at this moment deranged, but that he would be glad to pay it, as soon as his accounts with his agent are cleared, this admission will dispense with proof of a protest. *Gibbon v. Coggan*, 2 Campb. 188; *Greenway v. Hindley*, 4 Campb. 52.

Besides, the want of due notice is answered by showing the holder's ignorance of the place of residence of the party whom he sues; and whether he used due diligence to find the place of residence, is a question for the jury. *Bateman v. Joseph*, 12 East, 433, and *Baldwin v. Richardson*, 1 B. & C. 245. Inquiry was here made of one of the parties to the bill, which brings it within the case of *Beveridge v. Burgis*, 3 Campb. 262. And it has even been decided, that calling on the last indorser, and last but one, the day after the bill becomes due, to know where the drawer lives, and on his not being in the way, calling again the next day, may be sufficient. *Browning v. Kinnear*, 1 Neil Gow. N. P. R. 81.

Judgment affirmed.

Cited by Counsel, 2 Wh. 237; 3 Wh. 118; 5 Wh. 167; 2 W. & S. 141; 4 W. & S. 509; 6 W. & S. 263; 7 W. & S. 265.

Cited by the Court, 9 W. 279; 6 W. & S. 401; 5 Barr, 181.

*[PHILADELPHIA, FEBRUARY 2, 1832.]

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Potts Administrator *de bonis non*, &c., of May, to the use of Wollerton and Another, *against* Smith and Another, surviving Executors of Smith.

IN ERROR.

An administrator *de bonis non*, can claim nothing but the goods, &c., of the intestate remaining in specie, unconverted and unchanged at the time of the death of the original administrator.

Therefore, an administrator *de bonis non*, cannot maintain a *scire facias* upon a judgment on an administration bond to recover a balance due from the original administrator to the estate of the intestate.

Quere, whether the representatives of a deceased co-administrator, and co-obligor, can be made liable for the assets of the intestate, which came exclusively to the possession and management of his surviving co-administrators and co-obligors, who settled an administration account, charging themselves alone with the amount of such assets?

THE record of this case having been returned on a writ of error to the Court of Common Pleas of *Chester* county, it appeared that the plaintiff in error, David Potts, administrator *de bonis non*, &c., of Robert May, deceased, issued a *scire facias* to the use of John Wollerton and George Baugh, upon a judgment on an administration bond in the name of the commonwealth, against the defendants in error, Elizabeth Smith and Levi Bull, who survived Thomas B. Smith, and who, together with the said Thomas B. Smith, were the executors of John Smith, deceased.

The whole case is comprised in the charge of the court below, which at the request of the plaintiff's counsel, was reduced to writing, and filed in pursuance of the act of assembly of 24th February, 1806.

After having recommended a nonsuit, which the plaintiff refused to submit to, the court delivered the following

CHARGE.—“A judgment has been rendered against the defendants for the penalty of the administration bond, and the plaintiff David Potts, administrator *de bonis non* of Robert May, deceased, supposing himself to be one of ‘the person concerned,’ and a party aggrieved by the misfeasance or nonfeasance of the party giving it, has brought this *scire facias* to enable him to prove what damage he has sustained, so that he may levy execution. He has proceeded to show that the original administrators of Robert May, deceased, have filed an inventory, and has given evidence of a large amount of property, which probably came to their hands; and also a state-

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ment in the Orphans' Court of this county, upon a report of auditors of the accounts of Ruth May and James B. Harris; [*362] the last, the surviving *administrator of Robert May, deceased, whereby it appears there was a balance due the estate of three thousand seven hundred and ninety-one dollars, sixty-eight and a half cents. This sum with its interest he claims as administrator *de bonis non*, &c., from the executors of Mr. Smith, one of the obligors in the bond, and one of the first administrators. He has not shown that there are any goods and chattels of the intestate which remained in specie, unadministered in the hands of the defendants, nor any sum of money of the intestate, which has been kept by his administrators, or any of them, separate and unmixed with their own (and if he had it would tend to support another action rather than this on the administration bond), but he claims in this *scire facias* the balance found on settlement due the estate, so that he may proceed and finish the estate and finally distribute it.

"The court is of opinion that the plaintiff cannot recover. His business is only with the goods, &c., of the intestate, unadministered. There is no obligation on the part of the representatives of the deceased administrator, to hand over the balance to him. There is no privity between them; no contract expressed or implied; on the contrary, the representatives of the deceased administrators are liable at law to an action at the suit of creditors, or next of kin, for the balance of the estate in their hands; and if he should have paid that balance voluntarily to the plaintiff, the administrator *de bonis non*, &c., would he still not be liable to the creditors and distributees? Would it not be a *devastavit*? The conditions of the administration bond are, that they will file an inventory, settle an account, and pay to such persons as are entitled, such as the Orphans' Court shall appoint: but the Orphans' Court would not direct a payment to plaintiffs, whose only duty is, and who only gave security for the unadministered goods of the intestate. The court knows of no instance in which the administrator *de bonis non* has succeeded in such a claim either at law or in equity: and however convenient it might be that the law should be so, and the administrator *de bonis non*, receive the balance in the hands of the former administrator, and settle the whole concern at once, the court ought not to legislate into existence a new remedy, especially as they cannot destroy the liability of the first administrator, to creditors and distributees. It would be presumption in this court not only to adopt a new remedy, but to sanction a new right, before either the legislature or the

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Supreme Court have adopted such a rule of action for the whole state."

The following errors were assigned in this court, viz. :

First. The court erred in charging the jury, that after a judgment had been obtained by the commonwealth, against the above defendants upon the administration bond of John Smith their intestate, or the administrator of Robert May deceased, an action of *scire facias* upon such judgment could not be sustained by the above plaintiff as *administrator *de bonis non* of the said Robert May, for the balance due to the [*363] estate of the said Robert May by the original administrators thereof.

Second. The court erred in charging the jury that this action could not be supported upon the facts given in evidence and contained in the bill of exceptions.

Third. Plaintiff in error assigns the general errors.

Dillingham and Tilghman, for the plaintiff in error.—The case of *Allen v. Irwin*, 1 Serg. & Rawle, 549, decided that *assumpsit* could not be maintained by an administrator *de bonis non*, against the administrators of a deceased executor for money had and received by such executor to their use: and the court below, in this case considering it precisely analogous to an action of *assumpsit*, following the reasoning which led the Chief Justice in the case referred to, to doubt, whether any action would lie by an administrator *de bonis non* against the representatives of the executor, arrived at the conclusion that it would not lie. In the case cited it is remarkable that the Chief Justice sets out with declaring, that on that point, he "does not mean to give an opinion," but that he considered it "so doubtful that it was desirable the law should be made clear by an act of assembly." The cause was decided upon another ground, but Judge Yeates dissented; and although there is no written opinion reported, he must have dissented from the views of the Chief Justice as expressed on this point, or he could not have been opposed to the reversal of the judgment. He must therefore have been of opinion that the action would lie, and thus we have the positive opinion of Judge Yeates on this point, as to which the other judges doubted, but expressly declined giving any opinion. The plaintiff in error founds his claim upon the provisions of the act of assembly of March 27, 1713, section 14, Purd. Dig. 613, as one of the persons "concerned," for whose benefit the judgment on the administration bond is to be used. The administrator *de bonis non* is the only person by whom the estate can be properly administered, and as representing the interests of all who have claims upon it, is clearly one of the persons "concerned." This

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is a word of large import, and the present proceeding being a *scire facias* upon an administration bond which creates privity between the party, the court have a wider scope than in an action of *assumpsit* in which the difficulty in the mind of the Chief Justice was the want of privity of contract. But if this be not so, the great inconveniences resulting from a denial of the right now claimed amounts to a moral necessity for its exercise, to prevent a failure of justice. Take the case of an extensive banker who dies intestate, leaving a large amount of notes in circulation: His administrator gives bond, receives his whole estate, converts it into United States stock, and then dies leaving an executor: Can it be possible that each noteholder must bring a separate action against the executor of the administrator, [*364] when the whole estate might be so easily settled *by permitting the administrator *de bonis non* to recover and administer the assets belonging to the estate he represents? The same inconvenience would result in all cases in which large concerns were represented by the original executor or administrator. To require the course indicated to be pursued, would violate the principles which have uniformly governed the legislature of Pennsylvania, whose effort from the earliest times has been to simplify remedies and avoid costs. There is no decision in Pennsylvania opposed to the present proceeding. *Allen v. Irwin* did not touch the point. There was no proceeding on an administration bond. It was a suit by an administrator *cum testamento annexo*, against an administrator of an executor. The present suit is by an administrator *de bonis non* against the executors of the original administrator. In the former case, no question of statutory remedy could arise; but all the reasoning of the Chief Justice goes to support the remedy now asserted, even if the statute were silent on the subject, and his doubts as to a new form of action suited to the exigency of the occasion have been since overcome in several instances, in which they have been sustained, to prevent a right from being lost from the want of a remedy. *Brown v. Furer*, 4 Serg. & Rawle, 217; *Gause v. Wiley*, 4 Serg. & Rawle, 521; *Steinman v. Saunderson*, 14 Serg. & Rawle, 357.

If an executor or administrator be dismissed, he is ordered to deliver over all the trust funds into the hands of the administrator *de bonis non*. If, after such order, the dismissed executor or administrator should die, cannot the administrator *de bonis non* recover those funds from his personal representatives? There surely cannot be one rule if he should live, and another in the event of his death. *Hampton's Case*, 17 Serg. & Rawle, 147.

If each of the creditors of Robert May must institute a separate proceeding by *scire facias* under the judgment on this ad-

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ministration bond, the whole system of our intestate law will be overthrown, for whoever brought the first suit would be entitled to priority of payment, instead of all debts in equal degree being paid *pro rata*. *M'Kean v. Shannon*, 1 Binn. 370; *Leiper v. Levis*, 15 Serg. & Rawle, 108, 113.

Bell, for the defendants in error.—It is a rule both at common law and in equity, that an administrator *de bonis non* cannot maintain an action against the administrator or executor of a deceased administrator or executor to recover assets of the intestate or testator which have been administered by his predecessor. By the phrase, administered assets, is meant such as have come to the hands of the first representative and do not remain in specie. There is no contract express or implied that the representatives of the first administrator shall hand over to the administrator *de bonis non* any balance of the estate appearing on the settlement of an administration account by the first executor or administrator, because there is no privity of contract between the parties. That there is no privity is strongly shown by the fact, that prior to the statute 17 Car. 2, ch. 8, an administrator **de bonis non* could not sue out execution on a judgment recovered by the first administrator, be- [*365] cause he was not privy to the judgment, but was put to a new suit. 3 Ba. Ab. 20; *Cleve v. Veer*, Cro. Car. 452, 459; *Yaites v. Gough*, *Harrison v. Bowden*, Yelv. 33; *Latch*. 140; *Turner v. Davies*, 2 Saund. 149; *Sid.* 29, 149; *Grant v. Chamberlain*, 4 Mass. Rep. 613. Thus it is clear, that at common law, there was no manner of connection between the administrator *de bonis non* and the first representative of the estate. Where the property has been altered, it rests with the administrator, and in the event of his death it goes to his representatives, and not to the administrator *de bonis non*. 3 Ba. Ab. 20, 21; 1 Vern. 473; *Roll. Ab.* 380; *Gord. Law of Dec.* 98. That the law is so, is clear from the exception to the general rule, that if goods remain in specie, or if money be kept separate, they go to the administrator *de bonis non*. *Wankford v. Wankford*, 1 Salk. 306. He is entitled to the goods left unadministered, that is, unaltered. *Toller*, 86, 117; *Attorney-General v. Hooker*, 2 P. Wms. 340. That this is the English rule is placed beyond a doubt by the case of *Allen v. Irwin*, 1 Serg. & Rawle, 549; and it is right that it should be so. The administrator *de bonis non* gives bond to secure merely the due administration of the unadministered part of the assets, and his surety cannot be charged beyond the letter of his bond. *Reed v. The Commonwealth*, 11 Serg. & Rawle, 441. But the representatives of the original executor or administrator remain liable to creditors, legatees, and distrib-

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utees. *Allen v. Irwin*, 1 Serg. & Rawle, 555. So doubtless do the sureties in the bond given by the first administrator, and it would be unfair to make them stand liable for the acts of an individual with whom they have no connection, without at the same time making some provision for their security. If a system complete in all its parts could be established, by which the administrator *de bonis non* would be compelled to give security, all parties interested authorized to bring suit against him, and the sureties of the original administrator released, it might perhaps be more convenient to permit the administrator *de bonis non* to recover from his predecessor the balance remaining due from him; but such a system has not been established, and arguments *ab inconvenienti*, are not sufficient to induce the court to change the law or provide a new remedy. In the case of a legacy charged on land, the court assumed jurisdiction from absolute necessity to provide a remedy, without which there would have been, what the law abhors, a right without a remedy. But to sustain the present proceeding, would be not only to apply a new remedy, but to sanction a right hitherto unknown.

The circumstance of the bond being given under the act of the 27th March, 1713, does not affect the rule. The condition of the bond is nearly word for word the same as that required by the statutes 21 H. 3, ch. 3, and 22 and 23 C. 2, ch. 10; and we have seen what the English rule is on the subject. The fourteenth section of the act of the 27th of March, 1713, provides that such a bond as this shall be for the use of the person or persons [*366] concerned, and gives *the benefit of it to the relief and “advantage of the party aggrieved by the misfeasance or nonfeasance” of the person giving the bond; but it does not widen the limits of the rule as to who are the parties concerned. Its only object was to provide a further security for, and give a new remedy to the parties, who, according to the existing rule, were the “persons concerned.” As far as creditors are concerned, it is only in aid of the provisions of the statutes of 30 C. 2, ch. 7, and 4 and 5 W. & M. ch. 24.

The opinion of the court was delivered by

KENNEDY, J.—Ruth May, James B. Harris, and John Smith joined in taking out letters of administration upon the estate of Robert May, deceased, and gave bond with sureties in the name of the commonwealth, in the form prescribed by law, to the register. John Smith died, Ruth May and James B. Harris surviving, who settled their administration account, which was approved and confirmed by the Orphans’ Court of Chester county. From this account, as settled, there appeared to be three thousand seven hundred and ninety-one dollars and sixty-

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eight cents remaining in the hands of the accountants, moneys arising from the sale of goods of their intestate, and the collection of debts due and owing to him at the time of his decease. A suit was brought upon the administration bond, in the name of the commonwealth, against Elizabeth Smith, executrix, and Levi Bull, who survived Thomas B. Smith, executors, &c., of John Smith, and a cautionary judgment had against them for the amount of the bond. In the meantime, Ruth May and James B. Harris both died; after which letters of administration *de bonis non* of Robert May were granted to David Potts, who sued out a *scire facias* upon the judgment obtained as aforesaid, for the purpose of recovering the three thousand seven hundred and ninety-one dollars and sixty-eight cents, charged against Ruth May and James B. Harris in their administration account already mentioned, and who had been co-administrators with John Smith the testator of the defendants in this case. On the trial of the cause below, the only question was, whether upon the foregoing state of facts the plaintiff was entitled to a verdict in law for the three thousand seven hundred and ninety-one dollars and sixty-eight cents. The court charged the jury that in law, upon the facts as already stated and which were not then controverted, their verdict ought to be in favour of the defendants, which was accordingly given.

The error assigned is to this charge of the court. This case involves a question which does not appear to have been noticed in the court below, nor was it raised here; which is,—Can the representatives of a deceased co-administrator and co-obligor, be made liable for the assets or goods of the intestate, which came exclusively to the possession and management of his surviving co-administrators and co-obligors, who have settled their administration account, in which they alone are charged with the amount? As the court, however, are of opinion that the plaintiff cannot maintain his *scire facias* upon the *judgment against the executors of John Smith, nor yet against [*367] the representatives of any of the first administrators of Robert May the intestate, it becomes unnecessary to consider or decide this question.

In the first place it will be proper to recur to the law as it stood originally in regard to the personal property of intestates. At the common law upon the death of a person dying intestate, the whole of his personal estate belonged to the ordinary, or bishop, to be disposed of by him according to his conscience, to pious uses. Neither his wife, children, nor any of his kindred, had claim or right to any part of it. Occasionally they might be among the number who were appointed to receive, but this depended entirely upon the will and pleasure of the ordinary.

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for he had the right by law to the absolute disposition of it. He was not even bound to pay the debts of the intestate, out of his estate, until the statute of Westminster 2, 13 Edw. I. cap. 19, imposed that obligation upon him so far as he had assets, and gave an action of debt against him if he disposed of the goods, and neglected or refused to pay the debts. 11 Vin. Abr. 52, note pl. 1. Next came the statute of 31 Ed. 3, cap. 11, by which the ordinary was required to depute the next and most loyal friends of the person dying intestate to administer his goods; and the persons so deputed were thereby authorized to recover by action, debts due to the deceased, in the same manner as executors, and to answer and account for the same, as also for all other assets of the deceased, as executors. 11 Vin. Abr. 91, pl. 1. To this succeeded the statute of 22 Hen. 8, cap. 5 sec. 3, by which the ordinary was directed in cases of persons dying intestate, or of the executors refusing to prove the testament, to grant administration to the widow or next of kin, or both, at his discretion, taking surety for their true administration. Ib. pl. 2. This statute made it the duty of the ordinary to grant administration of the goods of the deceased to the widow or next of kin, leaving it still, however, entirely at his discretion to give it to the one or the other, and in case of there being several of the next of kin in equal degree, to select any one, or more of them, and after having once granted the administration, he was bound by it, and could not revoke it as he might have done at common law. 11 Vin. Abr. 52, note to pl. 1, page 115, pl. 15; *Offley v. Best*, 1 Lev. 186; *Betsworth v. Betsworth*, Style, 10; *Stapleton v. Sherrard*, 1 Vern. 315; *Sand's Case*, 3 Salk. 22; 11 Vin. Abr. 114, note to pl. 3. But still it was found that the ordinary had such a latitude of discretion in selecting from among the next of kin, as to leave the most helpless and needy of them out of the administration, and thus deprive them of all benefit and assistance from the estate of the deceased; or where the children were of such tender age, as to be incapable of administering, and for the same reason stood most in need of a subsistence from the estate, or were abroad beyond seas, administration was granted to a stranger, who got the whole of the estate, because the administration being once committed to a person, he thereby became entitled to the whole of the personal estate, after paying the debts.

[*368] This the ordinaries *endeavoured to prevent by taking bonds of the administrators, which was, that after debts and legacies were paid, the administrator should distribute the residue of the goods, at the appointment of the ordinary. This practice continued until about the 12th of King James, when the temporal courts first granted prohibitions to restrain the

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spiritual courts from compelling administrators to make distribution according to these bonds, and decided that the bonds, not being taken in conformity to the statute, were void. 11 Vin. Abr. 52, note to pl. 1, 183, pl. 1, 357, pl. 2; Seawney v. Elbridge, Hob. 83, pl. 110, s. 6; Hughes v. Hughes, 1 Lev. 233.

It is clear then, that from the passage of the statute of 21 Hen. 8, cap. 5, until the passage of 22 and 23 Car. 2, commonly called the Statute of Distribution, that administrators stood on the same footing, or better, because they had no legacies to pay, with regard to the surplus of the personal estate of the deceased, after payment of all his debts, as executors, that is, entitled to it as absolute owners. By the statute of Westminster 2, the ordinary was required to pay the debts of the deceased when the goods came to him to be disposed of, so far as they extended, in such sort as the executors of such persons should have done in case they had made testaments. 11 Vin. Abr. 52, note to pl. 5. The obligation imposed by this statute devolved upon administrators when they came to be appointed by a commission, from the ordinary, that was no longer considered a mere naked authority and revocable, but coupled with a right of property, and an interest, that rendered the grant absolute and irrevocable, and bound them to pay debts after the manner of executors; but if executors sold the goods or collected the debts of the testator, and died without paying the debts of the testator, it was a *devastavit* in them and the creditors were without remedy. They could bring no action against the personal representatives of such executors, for the injury sustained by the waste committed was in the nature of a tort, where the rule is, *actio personalis moritur cum persona*. 11 Vin. Abr. 219, pl. 4; Sir Brian Tuck's Case, 3 Leo. 241; Brown v. Collins, 1 Ventr. 292; 1 Saund. 219, d. note. A remedy however was provided for this, by the statute 30 Car. 2, cap. 7, explained and made perpetual by 4 and 5 W. & M. cap. 24, sec. 12, which makes the executor, or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, liable and chargeable in the same manner as their testator or intestate would have been if they had been living. Now to whom would their testator or intestate have been liable if living? to the creditors, or the legatees or distributors if you please, but certainly not to the *administrator de bonis non*, because there was no such person in being. 1 Saund. 219, d. note.

From the view which has been taken of executors and administrators, their rights and responsibilities at this time were made

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substantially the same, a matter that has been doubted by some. The statute last referred to places them upon the same footing [*369] and makes *them alike responsible. Every executor or administrator who has sold and converted into money the goods of his testator or intestate, or collected the debts owing to them respectively, and refuses or neglects to pay the debts of the deceased, is guilty of a *devastavit*. This is clearly proved by the case of almost daily occurrence, where such an executor or administrator is sued by a creditor, and judgment had against him, upon which a *fiery facias* is issued directed to the sheriff, commanding him to levy the amount out of the goods of the testator or intestate, in the hands of the executor or administrator; now, as the executor or administrator has converted, that is, has sold all the goods of the deceased which came to his hands, it is impossible for the sheriff to find any whereon to levy; and if the defendant in the execution refuses or neglects to pay the amount of it he is considered guilty of a *devastavit*, and the sheriff will be justified in making a return to that effect upon the *fiery facias*. See Serjeant Williams's notes already referred to, 1 Saund. 219, b. 6. All this goes to establish, that the collection of the testator's or intestate's debts, or a sale of his goods by the executor or administrator, is such an administration of them as to preclude the administrator *de bonis non* from claiming or exercising any power or authority over them or the proceeds of them. They are not embraced within his commission, which is for the administration of the goods and chattels, rights and credits which were of the testator or the intestate at the time of his death, and remain unadministered. For unless they remain in specie, it cannot be said that they were of the goods and chattels, rights and credits which belonged to the deceased at the time of his death. Again, if the collection of debts owing to the deceased, or the sale of his goods, by the executor or administrator, had not been such an administration as to put these things beyond the reach and control of the administrator *de bonis non*, there was but little, if any occasion, for the statutes of 30 Car. 2, and 4 and 5 W. & M. already mentioned, because the administrator *de bonis non* could have maintained his action, as it certainly would have been his duty to have done; so if he had the right and the authority, for the recovery of all the moneys received, as well in payment of debts due to the deceased, as upon sales made of his goods, by the executor or administrator, against the personal representatives of such executor or administrator, and when recovered have paid the creditors, legatees, and distributees, the enactment of that statute would have been useless. The provisions, however, of these statutes prove conclusively to my mind, that such right and authority were never

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supposed to have existed on the part of the administrator *de bonis non*. Beside before the statute of 22 and 23 Car. 2, when the administrator became absolute owner of the residue of the personal estate, after paying the debts of the deceased, it would have been repugnant to the rights of the deceased administrator, as well as absurd, to have given the administrator *de bonis non* the right to have called the personal representatives of the deceased administrator to an account of all the moneys received in *payment of debts owing to the intestate, as also those [*370] received upon sales made of the personal property and to have compelled them to pay all over to him. It was sufficient for any purpose that the administrator *de bonis non* had to accomplish, that he obtained possession of everything belonging to the original intestate, which remained in specie, not converted or changed. The more he found in this state the better for him, and a loss as it were to the estate of the first administrator, whose fault it was that he had not secured the whole estate by a change or conversion of it. Had it been that the administrator could have demanded the proceeds of debts collected, as also of sales made by the first executor or administrator, no executor or administrator could have had the benefit of what was given to him by the testator or the law, and the course of administration by granting commissions *de bonis non administratis*, would have been interminable. For whatever of the goods of the testator or intestate remained unadministered at the death of the executor or administrator could not be passed or transferred by his will; 11 Vin. Abr. 109, pl. 3, 421, pl. 6, 267, pl. 6. These goods ceased to have an owner until the ordinary gave them one by appointing an administrator *de bonis non*, in case of an administrator's dying, or of an executor dying without appointing his executor, and in case of his having appointed one, then by granting probate of the will to his executor, the executor of the first executor became in effect the executor of the first testator; 11 Vin. Abr. 421, pl. 6, 267, pl. 6. So that the only means which the first administrator or executor had of securing to himself the benefit given him by the law or the will, in the testator's or intestate's estate, was to dispose of it or to convert it, which he had the power of doing, and thus make it his own, so that he did not injure creditors, and if he did, they had their remedy without the intervention of an administrator *de bonis non*, under the provisions of the statutes of 30 Car. 2, and 4 and 5 W. & M.

That it ever has been considered to be the law by courts and jurists, that the collection of debts due to the testator or intestate, or disposition, change, or alteration of the goods made by the executor or administrator, would protect them from the claim of the administrator *de bonis non* as unadministered goods, will

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abundantly appear from adjudged cases and other authorities, some of which I will refer to.

Lord Chancellor King, in *Attorney-General v. Hooker*, 2 P. Wms. 340, says, "all the personal estate, the property whereof is not altered, shall go to the administrator *de bonis non*." In *Tingrey v. Brown*, 1 Bos. & Pull, 311, Chief Justice Eyre, says, "everything is unadministered which has not been reduced into the actual possession of the executor and converted by him." In *Wankford v. Wankford*, Salk. 306, by Holt, Chief Justice: "If the goods of the testator remain in specie, they shall go to his administrator *de bonis non*, because in that case it is notorious which were the goods of the testator, and they are distinguish- [371] able; and there is the same reason, *where money is kept by itself, and the husband permits it to be so, but if the husband seizes it, it will be his, and will be a *devastavit*." He is here speaking of an executrix of the obligee, who had intermarried with the obligor and received from him the money due upon the obligation. So, upon the same principle, if the executrix without marrying the obligor had received the money from him, and put it in with her own, or used it in any way, its distinguishing mark would have been gone; it would have been a conversion, a *devastavit*, and the administrator *de bonis non* would upon the principle here laid down, have no claim to it. The same principle will be found in 3 Bacon's Abr. title Executors and Administrators, 19, 20, where it is said, that "an administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate." From this it would appear, that if the goods are changed or altered, and remain no longer in specie, or have been disposed of, the administrator *de bonis non* cannot claim them; and so of the debts, unless they be such as grow out of contracts to which the testator or intestate was a party, for otherwise they cannot be said to be debts due and owing to the testator or intestate, which is fully established by the decision of the Lord Chancellor in *Barker v. Talcot & Shaw*, 1 Vern. 473, where the administrator of a lessor settled with the tenant or lessee for arrearages of rent due to the intestate at the time of his death, received part of the amount in money, and took the tenant's note payable to himself for the balance, and died, the note remaining unpaid: it was held upon a full hearing, that the note given to the administrator was *quasi* payment, and a good conversion, and that the same ought to go to his administrator and not to the administrator *de bonis non*: this too, it may be observed, was the decision of a court of equity. In *Jenkins*

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v. Plume, 1 Salk. 207, it is said by the court, that if a third person receive a debt due and owing to the testator with or without the consent of the executor, yet the executor may sue such person for money had and received to his, the executor's use, and in case it was received without his consent, it becomes assets the moment he obtains judgment for the amount without execution, although if he had sued the original debtor, that is, the person who owed the money to the testator, it would not have been assets till levied by execution or received. If the money had been received by such third person with the consent of the executor, it would in effect have been a payment to the executor himself and assets in his hands immediately, and a discharge of the debtor, but if received without his consent, it would only be made a payment or discharge of the debt by his subsequent conduct. His bringing suit for the money against the receiver was an assertion of his right to it, and a confirmation of the payment, which he could not retract after obtaining judgment for it. The original debtor was thereby discharged, the executor himself became responsible for the *money. It was no longer [*372] money due or owing upon a contract made to which the testator was a party, but money for which the administrator recovered a judgment upon a promise, as appeared by the record, made to himself. In short, the administrator by his affirming and ratifying the payment of the debt to the defendant had changed or converted it; administered it, as the court must have understood it, for they say, in case of the executor's dying intestate before execution of the judgment and receipt of the amount of it, that his administrator, and not the administrator *de bonis non*, shall have a *scire facias* and execution upon it. So where the plaintiff, as executor, and the defendant, submitted by bond all controversies relating to the testator's estate to arbitration, and the arbitrator awarded that the plaintiff should deliver certain goods, of which the testator died possessed, to the defendant, and that the defendant should pay to the plaintiff three hundred and twenty pounds, in an action upon the bond, for having failed to perform the award, the defendant pleaded that the money awarded to be paid by him was attached by writ of foreign attachment according to the custom of London, and adjudged by the court that although it were assets yet it was not attachable, for then the administrator *de bonis non* might sue for it. *Horsam v. Turget*, 1 Vent. 111; s. c. by the name of *Horsey v. Turges*, 1 Lev. 306. And where a promissory note was made by a debtor of the testator to an executor (*ut executori*) such note shall go to the administrator of the executor, and not to the administrator *de bonis non*. *Betts v. Mitchell*, 10 Mod. 315.

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So in *Butler v. Bernard*, 1 Cha. Ca. 224, Lord Chancellor Finch held that where an administrator had made a mortgage of the intestate's term under a lease for years, and made A. his executor, and died, his executor, and not the administrator *de bonis non* of the intestate, was entitled to redeem, because the mortgaging of the term was an alienation and conversion of it. This decision was made in a court of equity where the administrator *de bonis non* was a party, praying the court to have the benefit of the redemption, which goes to show that the rights and claims of an administrator *de bonis non* are governed and regulated by the same principles both in law and equity. An administrator, as such, being possessed of a term of his intestate for a hundred years, made a lease for five years rendering rent to himself, his executors, and assigns, and after appointing his executor, died; his executor, and not the administrator *de bonis non*, was adjudged to be entitled to receive the rent which fell due under the lease. *Drew v. Bayly*, 2 Lev. 100; s. c. *Freeman's Rep.* 392; 1 Vent. 275, and cited in *Noel v. Robinson*, 1 Vern. 94. The same question was also decided in the same way in *Norton v. Harvey*, 1 Vent. 259. In these cases it was said by Lord Hale, that the rent when received would be assets, so that the fact of the money or other thing being assets does not determine it to belong to the administrator *de bonis non*.

This subject was ably and fully discussed in the court of appeals [*373] of Virginia; first by counsel who argued the cause twice, and afterwards by the judges, who delivered their opinions *seriatim*, in the case of *Coleman administrator de bonis non of Wernick v. M'Murd & Prentis*, in which it was decided, that the administrator *de bonis non* could not sue the representative of a former executor or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator, but such suit may be brought directly by creditors, legatees, or distributees. 5 Rand. 51. This court, at the last Sunbury session, decided in *Kendal's administrator v. Lee*, a case not yet reported, that the administrator *de bonis non* was not entitled to receive the money due upon a bond taken by the first administrator to himself to secure the payment in part of the purchase-money of land sold by him as the property of the intestate, under a decree of the Orphans' Court for the purpose of paying the debts of the intestate and supporting his minor children; and that a receipt given by the administrator *de bonis non* for the part of the amount of the bond paid him by the obligor was no defence *pro tanto* in an action upon the bond by the personal representative of the first administrator. And although this was not

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the case of a bond taken by the first administrator to secure the payment of the price of personal property of the intestate sold by him, yet a majority of the court were of opinion that even in that case the administrator *de bonis non* would have no claim to the bond or the money due upon it, because it was neither goods nor moneys of which the intestate died possessed, and which still remained not administered; and the Chief Justice, who delivered the opinion of the court, has shown very clearly the law to have ever been, that the administrator *de bonis non* could not claim the money due on a bond taken by the first administrator upon a sale of either personal or real estate made by him.

It is manifest too that the late Chief Justice of this court, from what he has said in delivering the opinion of the court in the case of *Allen et al. v. Irwin*, 1 Serg. & Rawle, 549, was inclined to think that the administrator *de bonis non* could not recover in any form of action against the administrators of the executor, the balance due from such executor upon the settlement of his administration account of the estate of the testator. He says, "I think it well enough settled that the administrator *de bonis non* could not support the present action" (which was *assumpsit*) "by any principle of the common law. He is entitled only to such goods or chattels of the testator as remained in specie in the hands of the executor at the time of his death, or to such money as belonged to the testator's estate, and had been kept by the executor separate and unmixed with his own. In all other cases the property was considered as vested in the executor and could not be recovered in any form of action by the administrator *de bonis non*. That such is the law will appear by the opinion of Chief Justice Holt, in the case of *Wankford v. Wankford*, 1 Salk. 306. And that it was so taken by Chief Justice Parsons, may be inferred from his opinion in *Grout v. Chamberlin*, 4 Mass. 611. In Pennsylvania, however, where the executor is held to be a trustee for the next of kin, for such *part of the personal estate as is not given away by the testator, there are strong reasons for supporting an [*374] action at law, provided chancery would support a bill filed by the administrator *de bonis non* in cases where the executor is a trustee for the next of kin. We directed the attention of the counsel to this point, but their researches here produced no instance of a bill in equity being sustained in such case. I have no doubt but an action will lie, in our courts, by a creditor or legatee of the testator or by the next of kin for the undisposed surplus of the personal estate. There does not seem therefore to be any necessity for the present action." The counsel for the defendant in this last case, are stated to have cited Ander-

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son, 23, pl. 49; Moor, 4, pl. 13; s. c. cited Ray, 82, in Paschal v. Warren, Cro. Car. 450, pl. 23, 457, pl. 3, 457, pl. 3; 12 Car. B. R.; Cleve v. Veer, s. p. in support of the proposition, that "if the administrator of the first intestate, brings an action for goods of the intestate and recovers, his administrator shall have execution of the judgment, but when he has recovered then the administrator of the first intestate shall compel him in a court of equity to render so much of the money as he had recovered, to him, for the use of the first intestate: I apprehend there is some mistake in this. There is no such case as the one referred to in Raymond, and the other cases do not contain any such principle. They establish this, that if the first administrator of the intestate bring an action of debt in *auter droit*, and recover judgment, but dies before execution, the administrator *de bonis non* cannot have a revival and execution of the judgment, nor can the personal representative of the deceased administrator have it. The judgment upon the death of the first administrator becomes a nullity. The administrator *de bonis non* was entitled to demand and receive the debt, but if not paid to him voluntarily, he could only enforce it by bringing a new suit; which was certainly the law until 17 Car. 2, c. 8, s. 2, changed it in case of a judgment after verdict, and gave the administrator *de bonis non* a right to sue out a *scire facias* and take execution upon it. See 2 Saund. 72, n. note, and the cases there cited. I have not met with a single case to support the proposition which is said to have been advanced by the counsel for the defendant in the case of Allen v. Irwin, nor have I found even a *dictum* to that effect, unless it can be made out by an inference from one imputed to Justice Hale in the case of Drew v. Bayly, 2 Lev. 100-1, a case already cited, where an administrator being possessed of a term for one hundred years, let for five years reserving a rent, and died. Upon suit brought by the executor of the deceased administrator it was adjudged that he was entitled to recover the rent, and not the administrator *de bonis non*. And Hale said, "the executor of the administrator shall have this rent, but it shall be assets in his hands liable to the debts of the intestate, for which he shall be charged as executor *de son tort*." If it were true that he would be chargeable with the rent when received as executor *de son tort*, it might perhaps be inferred that he would be so at the suit of the administrator *de bonis non*, as well as the creditors of the intestate, because I [*375] take it to be a general principle that an executor *de son tort* is liable to the action of the lawful executor or administrator. Carth. 104; 1 Ld. Raym. 661; 1 Com. Dig. tit. Administrator, c. 3, page 366, 4th ed. by Rose; Went. Exr. 331,

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Jeremy's ed. It is difficult, however, to conceive how the executor of the administrator could be made to be an executor *de son tort* in receiving rent or moneys which the court decided that he and he alone had a right to receive. For executor *de son tort, ex vi termini*, means one who acts without authority, of his own wrong. "He is such as takes upon him the office of an executor by intrusion, not being so constituted by the testator or deceased, nor for want of such constitution substituted by the ordinary to administer." Went. Exr. Jeremy's ed. 320. The decisions in the Court of Equity in the cases of *Barker v. Talbot & Shaw*, 1 Vern. 473, and *Butler v. Bernard* referred to above, repudiate the idea of the personal representative of the first executor or administrator being made liable to the administrator *de bonis non*, either as executor, *de son tort* or otherwise. For it must be observed that the administrator *de bonis non*, and the personal representative of the first executor or administrator were parties in each of those two last cases, and being in a court of equity, where form, or such like objection would be no impediment, the money must be considered as having been decreed to such of the parties before the court as was ultimately entitled to receive it, and as finally settling the question between the representatives of the first executor or administrator, and the administrator *de bonis non*, which of them should have it.

Cases have been referred to in order to show that everything growing out of or arising from the estate of the deceased, as the proceeds of sales made of the goods or of debts collected, and the fruits of suits brought for the conversion of the deceased's property, although prosecuted by the executors or administrators in their own names, are still to be considered assets in the hands of such executors or administrators, and to be accounted for as such after their death by their representatives, if not done by themselves in their lifetime: of this there can be no doubt. In law as well as equity, notwithstanding the alteration or conversion of the goods by the executor or administrator, since the statute of Car. 2, which in effect operates as a will for every person in England dying intestate, by disposing of and designating those who shall have his estate, the executors or administrators are considered trustees managing and administering the estate for the benefit of all concerned, that is, the creditors of the deceased who have the first claim upon the estate, and after paying them, the legatees or those entitled by the statute of distributions to the residue. But an administrator *de bonis non* is not, as I apprehend, to be considered a *cestui que trust* in such case, or as having claim in either law or equity, further than his commission as administrator *de bonis non* gives him a right, which is purely of a legal character, and extends only, as we have seen

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[*376] by the cases and authorities cited, to *those goods and chattels, rights and credits, which were of the testator or intestate at the time of his decease, and remain unadministered, that is, in specie, unaltered, or unconverted, by any act of the first executor or administrator. It is immaterial to creditors, whether they shall receive payment of their debts from the executor or administrator of the deceased executor or administrator, or of the administrator *de bonis non*; and it is certainly the duty of the one as much as that of the other promptly and without suit to pay the creditors of the first testator or intestate so far as either shall have assets of that character which are to be paid out by him in that way. It has been shown that if the executors or administrators die without paying the debts, and after having changed the specific character of the goods or debts of their testator or intestate, as by having converted the goods into money, or having collected the debts due and owing to their testator or intestate, or having taken new securities for them payable to themselves, and released or given up the old, that the creditors may sue and recover their debts of the personal representatives of such deceased executors or administrators, to the extent of the funds so converted or changed; and if a surplus should remain, that it may be recovered by the legatees or next of kin from them in a court of equity, where such exists, and in this state for want of a court of chancery, would be recoverable in courts of law. Hence there is necessity for placing such funds in the hands of the administrator *de bonis non*, or giving to him a right of action to recover the same. And although it has been said, and thought by some, that there is great inconvenience attending this course, and that everything which is considered assets in any point of view, belonging to the estate of the first testator or intestate, and which has come to the hands of the first executor or administrator, whether converted or not, and for which he remained accountable at the time of his death, had better, upon that event, go into the hands of the administrator *de bonis non* for final administration; yet, as it appears to me, there is an objection which might be raised against this. It would be taxing the estate of the first testator or intestate with the cost of a double if not oftentimes with a still greater charge of administration. For the first and every subsequent administrator would be entitled to commissions or compensation for selling and receiving the moneys arising therefrom, as also for collecting the debts and paying all out again, although it might only be to the administrator *de bonis non*, that it was paid, and thus it would become liable to deduction for commissions as often as it would pass from one administrator to the hands of a subsequent one on account of the death

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of the former; and this operation would have to be repeated as often as an executor or administrator, or administrator *de bonis non*, died without having fully administered the whole estate. It would also in many instances have a tendency to relieve the first executor or administrator, and occasionally the administrator *de bonis non*, from his responsibility, for and on account of sales made by him of the goods on a credit *when the security taken afterwards failed, or for having taken a new security, payable to himself for debts [*377] owing to the estate; because if after such acts of the executor or administrator, he dies, and the collection of these moneys be taken from his representatives, who certainly in justice ought to have the collection of them, if the estate they represent is to be held responsible for them, and to be committed to the care and direction of the administrator *de bonis non*, and it turns out afterwards that the moneys cannot be recovered on account of the insolvency of those who were bound to pay, it may be difficult, if not impracticable often to ascertain through whose default it was that the loss to the estate has been produced; whether it was owing to the insufficiency of the security at the time it was taken, or want of vigilance and attention on the part of the administrator *de bonis non*, in collecting it; and as often as this change is made the difficulty will be increased. Besides it would be taken the completion of an act of administration commenced, out of the hands of the representatives of the deceased executor or administrator, who generally being legatees or next of kin, and therefore entitled to a portion, if not the whole of the estate after payment of debts, may well be presumed to feel an interest in the matter, as to make them use all possible vigilance in looking after everything, where the slightest neglect, want of attention, or even want of address, might cause a loss to fall upon the estate of such executor or administrator, and putting it under the direction of the administrator *de bonis non*, who may have no interest in saving the estate of the first executor or administrator from loss, further than to avoid the appearance of gross or culpable negligence on his own part.

Such a change would also dispense with what I consider a salutary rule, and one now well established in respect to the payment of costs by an executor or administrator, which is, that wherever he brings an action *in auter droit*, that is, founded upon a transaction which arose in the lifetime of the testator or intestate and fails, he shall not pay costs, but if for a cause to which he himself was a party, although the fruits of the suit if successful would be assets when recovered, yet if he fails he shall pay the costs out of his own pocket. The only authorities against this rule are the cases of Bull v. Palmer, 2 Lev. 165 b.;

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Mason v. Jackson, 3 Lev. 60, and Cockerill v. Kynaston, as reported in 4 T. Rep. 281, with the *dictum* of Mr. Justice Buller in King v. Thom, 1 T. Rep. 489, but it is sustained by the following cases: Atkey v. Heard, Cro. Carr. 219; Jenkins v. Plume & Wife, 1 Salk. 207; s. c. 6 Mod. 91, 181; Harris v. Hanna, Rep. Temp. Hardw. 204; Pauler v. Delander, Andr. 357; Nicolas v. Killigrew, 1 Ld. Raym. 436; Blackway v. Betton, 2 Shaw, 342; Worfield v. Worfield, Latch, 220; Anon. Ventr. 109, 110, as also by the reason assigned for it; which is, that not being privy to the original transaction, he cannot be presumed to know exactly what the case may turn out to be upon investigation, and therefore shall not pay costs, but on the other hand where he is a party to it and therefore must be presumed [*378] to know all *about it, he will be held to act upon his own responsibility and not to saddle the estate with the costs of the suit in case of failure. See Yelv. 168; Hayworth v. David, Cro. Jac. 229; Grant v. Baily, 12 Mod. 440, and Jenkins v. Plume, 1 Salk. 207, and Justice Lawrence in Cowell v. Watts, 6 East, 412. In the case of Bolard & wife v. Spencer, 7 T. Rep. 358, Lord Kenyon says, "the rule has been long settled, that when an executor or administrator brings trover on his own possessions, alleging the conversion after the testator or intestate's death, and fails, he must pay the costs." He then further says, "there must be some mistake in the case of Cockerill v. Kynaston." See Ld. Ellenborough in Henshal v. Roberts, 5 East, 154. Lawrence, Justice, in Cowell v. Watts, 6 East, 412. It would be unreasonable to adhere to this rule, and to make the estate of the first executor or administrator responsible for costs while his representatives are deprived of all power, control, or management of the suit which is given to the administrator *de bonis non* to direct and manage as he pleases.

It is, however, objected in the present case, that the administration bond taken under our intestate law of the 19th of April, 1794, is of different import, or at least has been adjudged to have a different effect in Pennsylvania from the administration bond given in England in pursuance of the statute of distribution of 22 and 23 Car. 2, c. 10. Our bond, the form of which is given in the act of assembly of 1794, is almost a literal copy of the form prescribed by the statute of 22 and 23 Car. ch. 6, 10, and there is therefore no reason in this particular why the effect of such bond with us should be different from what it is in England. But it is said that it has been adjudged in England that the creditors have no interest in such bond and can claim no benefit from it, whereas it has been determined in Pennsylvania that they have. No doubt the law is so in Pennsylvania. Indeed, by a supplement to the intestate act of 1794, passed the

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4th of April, 1797, a mode of proceeding by creditors upon administration bonds against the principals and sureties, it is expressly provided for by the second section of the act. And it is also true, that for some time after the statute of 22 and 23 Car. 2, came into operation, it was held by the courts in England that the ordinary could not assign the bond to creditors, and that the non-payment of debts, however sufficient the assets might be for that purpose, was no breach of its condition. See Archbishop of Canterbury v. Wills, 1 Salk. 315-16; Greenside v. Benson, 3 Atk. 249-252; Baker v. Demarasque, 2 Atk. 66; Wallis v. Pipon, Ambl. 183, and Ashley v. Bailie, 2 Ves. 370, where Sir John Strange, master of the rolls, acknowledges, that it has been so decided, but says that he cannot see upon what ground. However, in the case of the Archbishop of Canterbury v. House, Cowp. 140, decided in 1774, unanimously by the King's Bench, it was held that a creditor had a right *ex debito Justitiæ* as well as the next of kin to sue upon an administration bond in the name of the Archbishop or his ordinary. This I believe has been considered the law ever since in England: so that it would appear that we have not only *borrowed from there the form of our bond, but the effect and construction given [*379] to it in that country before our revolution, and at the time of the passage of our act on the same subject. No argument therefore can be drawn from this source in favour of the plaintiff in error, although I think it furnishes one against him; because we have seen from the cases and authorities referred to, that the administrator *de bonis non* can claim nothing under and by virtue of the administration bond since the statute of 22 and 23 Car. 2, that he could not have claimed a right to before; and why should it be different here? I confess that I can see no reason.

In the last place the acts of assembly of the 27th of March, 1713, 1 Smith's Laws, 81, and of the 4th of April, 1797, 3 Smith's Laws, 296, have been referred to, and relied on, by the counsel for the plaintiff in error; and it has been urged that although this case is not thereby expressly provided for, yet they show how far a preceding executor or administrator, whose letters of administration have been revoked, or who has been dismissed from the administration by an order or decree of the Orphans' Court, may be and is made responsible to his successor for everything which came to his hands, as executor or administrator; that the present case, if not within the letter of these acts is at least within their spirit, and that the rights of the administrator *de bonis non* ought to be ascertained and regulated by the same principles, as they allege there is the same reason for it in the one case as there is in the other. The second section of the last of these two acts has been dwelt on more par-

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ticularly ; and it has been contended that inasmuch as that section in case of an executor or administrator being dismissed by a decree or order of the court, authorizes the court to order him "to deliver over and to pay to the successor all and every the goods, chattels, rights, credits, title deeds, evidences, and securities, which were of the decedent, and which came to his, or their hands, and remain unadministered, and to account with the said successor for all and every the goods, chattels, rights, and credits which shall have been previously administered, and pay over the balance which shall remain due from him or them to the said successor, in such manner and time as the said court shall, upon an examination and confirmation of such account (to be had according to the usual course of proceeding in case of accounts of executors and administrators settled in such courts,) award and order," the courts ought, in conformity to the principle therein manifested, to extend the rights of the administrator *de bonis non*, so as to give him everything which the courts by the provisions of this section are authorized to order a dismissed executor or administrator to pay, deliver over, and account for, to his successor. It is very certain that before the passage of these acts of assembly the administrator *de bonis non* could lay no claim to any part of the estate which had been administered, altered, or converted, that did not remain in specie, by the first executor or administrator. It appears to me that neither of these acts embrace the case of an administrator *de bonis non*.

[*380] His case was provided for, and his rights defined and established by the law as it then stood, but these acts were intended to provide for and apply a remedy to certain cases where none, or at least no adequate one, existed before. These cases intended to be provided for were, when letters of administration had been granted without bond and sureties being given, when sureties had been taken, but were insufficient, or when the executors or administrators of the decedent were wasting or mismanaging the estate. These are the only cases mentioned in these two acts, and I think it is impossible to make it out that the appointment of an administrator *de bonis non*, falls within any of the cases described in these acts. An administrator *de bonis non*, is not appointed because his predecessor had not given bond with sureties, or because, though he had given bond and sureties, yet they were not sufficient, or because he had wasted or mismanaged the estate, or because his estate and his representatives are not sufficient, and to be trusted with making good the amount of all that was administered or wasted, but because the first executor or administrator is dead, and there is therefore no one in being who by law has any power or right to take charge of that part of the estate which remains in

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specie and unadministered. It is obvious that it was impossible to remedy the evil intended to be provided for by these acts without taking everything belonging or relating to the estate out of the hands of the dismissed executor or administrator. The probability of loss being sustained by or through him if suffered to continue in office was the very reason and ground of dismissing him. This is in no wise applicable to the case of appointing an administrator *de bonis non*, so that he is neither within the letter, reason, or spirit of these acts. I however think, notwithstanding, that the second section of the last act has a pretty strong bearing upon the present case, but against the plaintiff in error. I consider it a strong demonstration on the part of the legislature that they considered the law in the case of an administrator *de bonis non*, and what he as such was entitled to, the same as I have laid it down in this case, otherwise if they had believed it to be such as the counsel for the plaintiff have contended for here, it would have been sufficient in so many words to have authorized the Orphans' Court upon the cause therein mentioned for that purpose being shown or proved, to dismiss such executor or administrator, and to appoint an administrator *de bonis non*, with all the rights, powers, and privileges of such. We must infer, however, that they were of opinion that this would not have been sufficient to attain the end in view, and therefore they expressly authorized the court to order the dismissed executor or administrator "to account with his successor for all and every the goods, chattels, rights, and credits which shall have been previously administered, and to pay over the balance," &c., as well as the unadministered goods, &c. Now it is impossible to make sense out of this part of the section which speaks of the goods, &c., previously administered, unless they are understood in the technical sense *de bonis non administratis*, and as *used in the commission granted [*381] to the administrator *de bonis non*; for if they were to be understood as meaning goods, chattels, rights, and credits, which had been previously and fully administered, as it was contended for by the plaintiff in error's counsel, and that all which were not fully administered must be accounted for to the administrator *de bonis non*, there could be no such balance from the administration of them in the hands of the dismissed executor or administrator as is there mentioned and directed to be paid over to the successor.

The plaintiff in error was not entitled to maintain his claim in the court below against the defendants, and the judgment of that court is therefore affirmed.

Judgment affirmed.

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Cited by Counsel, 2 R. 271; 2 Wh. 347; 9 W. 495; 1 W. & S. 292; 3 Barr, 427; 5 Barr, 360; 7 H. 202; 11 H. 165; 12 C. 443.

Cited by the Court, 9 W. 257.

The language of the Court in 9 W. 480 and 7 Barr, 320, seems to imply that the law of this case is changed by the Act Feb. 24, 1834, (p. 1. 77.) The object and effect of that Act was to invest every administrator *de bonis non* with power to collect from his predecessor or his legal representatives all assets in his hands that belonged to the estate. Prior to its enactment this could only be done by creditors and legatees of the estate. The Act did not supersede the doctrine of the principal case; the representative of the deceased executor or administrator is still entitled to collect the assets upon which administration has been begun, and the only change is that now he accounts for them to the administrator *de bonis non*, while formerly he was accountable only to creditors and legatees of the estate. 7 O. 618 *et seq.*

[PHILADELPHIA, FEBRUARY 2, 1832.]

Jones and Another *against* Trimble.

IN ERROR.

Where the board of managers of a turnpike company authorized two of their number (the plaintiffs) to borrow twelve thousand dollars of a bank for the use of the company, pledging the stock for its repayment, and the defendant, and several other members of the board entered into a written agreement to guarantee each one-twelfth part of that sum to the borrowers, if the stock should not be sufficient, and the money was borrowed accordingly and applied to the use of the company, who set apart one thousand dollars to meet discounts, and the plaintiffs, after that sum was exhausted, continued to renew the note from time to time, paying the discounts and curtailments required by the bank, out of their own funds, until the whole was ultimately paid off:

Held, that the contract was an entire one; that the defendant's liability continued as long as the loan continued; that the plaintiff's cause of action accrued when the whole of the money was paid, and that if suit was brought within six years from that time, the act of limitations was not a bar.

WRIT of error to the Court of Common Pleas of *Delaware* county.

Nathan Jones and Gavin Hamilton, the plaintiffs in error, were plaintiffs below, and brought this action of *assumpsit* against William Trimble, the defendant in error, upon a contract entered into under the following circumstances:

In the year 1817, the plaintiffs, the defendant and others, were managers of the Philadelphia, Brandywine and New London Turnpike Company. The company being in want of funds to prosecute their work, the plaintiffs were appointed a committee to negotiate a loan of twelve thousand dollars with the Bank of [382] the United States. *The bank declined making a loan upon the security of the company, which was reported to the managers, when the following resolutions and agreement were entered into:

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"At a meeting of the managers of the Philadelphia, Brandywine and New London Turnpike Company, held April 4, 1817, at the Conestoga Wagon, present, Gavin Hamilton, president, *pro tempore*, John Worrall, Mahlon Parsons, Thomas Garrett, Aaron Palmer, William Trimble, Nathan Jones, Francis Wisely, Samuel Garrett, treasurer and secretary,

"It was resolved, that Nathan Jones and Gavin Hamilton be authorized to borrow twelve thousand dollars of the Bank of the United States, for which the stock of the company is pledged, and we of the managers, whose names are hereunto subscribed, do agree to guarantee each one-twelfth part of the above sum to the said Nathan Jones and Gavin Hamilton, if the above stock should not be sufficient.

(Signed,)

THOMAS GARRETT,
WILLIAM TRIMBLE,
MAHLON PARSONS,
JOHN WORRALL,
AARON PALMER."

"Resolved, That if Nathan Jones and Gavin Hamilton shall be able to obtain the aforesaid sum of twelve thousand dollars from the United States Bank, they shall apply six thousand dollars thereof for the payment of three thousand dollars borrowed by Thomas Garrett and Aaron Palmer, and likewise three thousand dollars borrowed by Nathan Jones and Aaron Palmer from the Bank of Delaware County, pay five thousand dollars thereof into the hands of the treasurer, and the remaining one thousand dollars in the United States Bank, to meet discounts."

The original paper containing the above resolutions and agreement, in the handwriting of the defendant, was sent up with the record.

At a subsequent meeting of the board, a similar agreement was signed by two other managers.

In pursuance of this agreement, Gavin Hamilton drew his note for twelve thousand dollars, in favour of Nathan Jones, dated June 10, 1817, at sixty days, which was indorsed by Jones, discounted by the Bank of the United States, and the money appropriated according to the resolution of the board. This note was renewed from time to time, in the same shape, for the same sum, and for the same terms of credit, for about a year, when the bank required it to be cut down. Jones and Hamilton communicated to the board of managers the requirement of the bank, and requested them to furnish the means to meet it.

It was proved by Samuel Garrett, the treasurer and secretary of

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[*383] *the company, who was examined as a witness in reference to this part of the case, that William Trimble was present at the meetings of the board of managers, after the money was borrowed by Jones and Hamilton, when the renewal of their notes was spoken of. Jones and Hamilton complained that they were obliged to cut down the notes, and wished the other members to pay something. The other members wished them to go on and renew the notes. The witness did not recollect that William Trimble actually expressed a wish that Jones and Hamilton should renew the notes, but he had a distinct recollection of the subject being mentioned in his presence, and he made no objection.

From the minutes of the company which were given in evidence, it appeared, that Trimble was present at meetings of the board of managers after the date of the agreement and resolutions of the 4th of April, 1817, above referred to, to wit, on the 6th of June, 1817, the 8th of June, 1818, the 3d of November, 1818, and the 6th of September, 1819.

The plaintiffs continued to renew the note at regular periods of sixty days, paying the discounts and stamps, and meeting the curtailments required by the bank until it was paid off on the 28th of October, 1823, when the amount paid by them independently of the thousand dollars appropriated to meet discounts, was fourteen thousand six hundred and twenty-one dollars and sixty-six cents.

This action was commenced on the 9th of January, 1828, to recover one-twelfth part of the last-mentioned sum with interest.

There was evidence given on the trial to show, that the stock of the company was entirely worthless; that the company was in debt to the amount of thirty thousand dollars, and never held any property on which an execution could be levied, and never received anything from tolls. On the other hand it was proved, that the materials of which the road and bridges were constructed, were of considerable value. The declaration contained three counts, of which the following is an abstract.

The first count stated, that in consideration that the plaintiffs at the special instance and request of the defendant, would borrow of the United States Bank twelve thousand dollars for the use of the turnpike company, of which the defendant was a manager, the defendant undertook and promised to pay them one-twelfth part of the said sum, if the stock was not sufficient: That the plaintiffs borrowed the twelve thousand dollars accordingly, and applied it agreeably to the directions of the managers: That they were afterwards compelled to repay the same, with interest, discount, and stamps, amounting to fourteen thousand six hundred and twenty-one dollars and sixty-six cents:

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That the stock of the said company was insufficient, and that the defendant had notice, whereby he became liable to pay, &c.

The second count set out the agreement and resolutions entered into by the board in terms; averred that the defendant and five others subscribed the same: That the plaintiffs borrowed the money *and applied it according to the last resolution: That they afterwards were compelled to repay it [*384] to the bank, amounting with discounts, &c., to fourteen thousand six hundred and twenty-one dollars and sixty-six cents: That the stock was not sufficient: That the defendant had notice, and consequently became liable to pay, &c.

The third count was *indebitatus assumpsit* for twelve thousand dollars money paid, laid out, and expended by the plaintiffs to and for the use of the defendant, and at his special instance and request.

The pleas were *non assumpsit* and the act of limitations. On the trial the defendant's counsel requested the court to charge the jury, that the act of limitations was a flat bar to the plaintiffs' claim.

The court charged the jury accordingly, and at the request of the plaintiffs' counsel reduced their charge to writing and filed it of record.

CHARGE.—“The material question in this cause is, at what time the right of the plaintiffs to call on William Trimble to fulfil his guaranty commenced? Because, as the defendant has pleaded and relied on the statute of limitations, the plaintiffs' cause of action must have accrued or been recognised since the 9th of January, 1822, or it is barred and gone; the law prevents their recovery entirely, let their merits or the hardship of the case be what they may. The plaintiffs contend that their cause of action did not commence until the 28th of October, 1823, when the last five hundred dollars were paid. The defendant on the other hand contends, that it was complete when the first note fell due; that the guarantee was for one loan, and when that note was taken up their right of action was complete.

“The court are of opinion that the truth lies between them, and that the true construction of the whole of this contract of guarantee is, not that it was to apply to a single loan for sixty days, which would probably have been of little use to the company, but taking it in connection with the resolution passed by the same managers, at the same time, appropriating one thousand dollars to meet discounts, it rather appears to be a contract to guarantee the payment of one loan, indeed, from the Bank of the United States, but to be continued by renewals, until the thousand dollars were exhausted in the payment of discounts, which would be about August, 1818. And if there were no parol evidence

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in the case, there would be little doubt, but that the moment that the fund failed, and the plaintiffs were compelled to pay, or commenced paying their own money to cut down the principal, or to pay discounts, their right of action commenced against somebody, for it cannot be well supposed that the guaranty was to extend to any indefinite time that it should be the pleasure of the bank or the plaintiffs to keep an account open by renewals of the fractions of the original debt. Whenever the means of continuing the original loan, and the time originally provided for had expired, the plaintiffs found themselves solely responsible to the bank, and obliged to look to their own resources; they paid the twelve thousand dollar note, by one thousand dollars in cash, and their note for eleven thousand [*385] *dollars; and it appears to us that they then had a complete right of action. We have been considering the case without reference to the parol evidence of Samuel Garrett, which is, that William Trimble was twice present at meetings of the board after this; (November 13, 1818, and September 16, 1819,) after the plaintiffs began to cut down and pay discounts out of their own pockets: That the plaintiffs were then pressing to have the notes taken up, or to be reimbursed what they had advanced to cut them down: The company were not able: They were requested by the members to go on and renew: He does not remember that William Trimble said anything, but he was present and did not object. Can it be inferred from this that the contract was varied, or the guarantee extended to any or an indefinite period of time? Or is it anything more than an application to the plaintiffs, considering that they were already liable to the bank for what they had not then paid, and already had a cause of action against the guarantors? It cannot, we think, be contended or imagined to be more than if William Trimble had said, 'we are liable, you have your action against us, but it is not convenient for us to pay now; go on and renew your notes, cut them down and pay them, we are liable on our old agreement, but we make no new one.' We think the plaintiffs' cause of action was then complete, and no new guaranty is shown to be made by the defendant and whatever declaration is shown to be made, or silent consent given, at either of those two meetings, could be no more than a recognition of his liability on the original guaranty to save the statute of limitations, and can reach no further than the 16th of September, 1819.

"That being the case, and no recognition of the contract having been shown within six years of the bringing of the action, (9th of January, 1828,) the defendant is entitled to your verdict."

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The following specifications of error were filed in this court :

First. The court erred in giving it in charge to the jury that the plaintiff's claim was barred by the statute of limitations.

Second. The court should have left the testimony of Samuel Garrett to the jury, and suffered them to put their own construction on it.

Third. The court erred in the construction put by them on the testimony of Samuel Garrett.

The cause was argued in this court by *Dillingham* and *Chauncey*, for the plaintiffs in error, and *Tilghman* for the defendant in error ; after which

The opinion of the court was delivered by

HUSTON, J.—This case is not the only one within my recollection, in which one of the parties has endeavoured to put his cause on points not appearing in the contract, or in the evidence.

It is said the turnpike company never was indebted to the Bank of the United States, and William Trimble never was indebted to the *bank. It is said Jones and Hamilton [*386] borrowed for themselves, and loaned the money to the turnpike company, and could have sued them next day. It is said the engagement of the turnpike company might be put out of the case, and then Trimble was liable to pay as soon as the company received the money : That the resolution of the managers, and the engagement of the defendant, and others, must be considered as separate and distinct agreements, not connected with each other. In short, that we ought to disregard the agreement of the parties, the objects of the parties, and the engagements and covenants of the parties, and try the cause, as if it had been what it is not.

That Jones and Hamilton even after they received this money from the bank might have employed it in some other way, or required some other security from the turnpike company, is all true, but as they did give it to the company, and did not require any other security than the resolution of the managers, and the written guarantee of the defendant and others, each for one-twelfth, we may throw away all supposed and supposable cases, and decide on the facts and documents in the cause. Whether, if Jones and Hamilton had become insolvent, and the company been rich and prosperous, the bank could have recovered this loan from the company, need not be decided, though I apprehend the Circuit Court of the United States on a bill in chancery, would not have thought it a difficult case.

Although Jones and Hamilton procured this money for the

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company, yet there were certain events which might have happened, after which they could not have sued the company with effect, *e. g.*, if the company could have sold for cash all its shares of stock, it could lawfully and properly have paid this twelve thousand dollars to the bank, as that stock was pledged to indemnify Jones and Hamilton. When the bank called for certain portions of the money at stated periods, or in the phrase used here, resolved to cut down the note, if the company as they were requested by the plaintiffs to do, could have paid those portions as they were called for, it would have been a compliance with their agreement as stated in their resolution, and Jones and Hamilton so far from having a right to sue the next hour after they paid the money to the treasurer, would never have had any right of action against the company, or the defendant; so too if the company had procured other drawers and indorsers to be substituted instead of Jones and Hamilton. But it is argued that the plaintiffs had a right of action as soon as the sixty days expired, and they gave a new note. There are cases in which giving a negotiable note may discharge a debt, even a debt on bond and mortgage, or on judgment, but it is in cases where by the agreement of the parties, this effect is to be produced; where the understanding and agreement is otherwise, such is not the effect; for instance, where an indorser wishes to be discharged, and the bank agree to accept another indorser, the latter becomes liable and the first indorser is discharged from his liability for that debt; but where the borrower from a bank, [*387] whose accommodation *is to last for some time, gives the bank, or gives his indorser, a mortgage to secure the payment of the money borrowed, that mortgage continues a security for the money borrowed, for the debt, and that is not discharged by giving a new note every sixty days.

The words of the resolution and guarantee, (for they form but one sentence,) are, "Resolved, that Nathan Jones and Gavin Hamilton be authorized to borrow twelve thousand dollars of the Bank of the United States, for which the stock of the company is pledged, and we of the managers whose names are hereunto subscribed, do agree to guaranty each one-twelfth part of the above sum to the said Nathan Jones and Gavin Hamilton, if the above stock should not be sufficient." This was signed by the defendant and four or five others, and then follows the resolution as to the application of the money, &c., &c.

Nothing is here found relating to the time, for which the loan should be obtained, nor any time limited after which the liability of guarantors should cease. The defendant and others guaranteed the payment of the sum, not of any particular note, or evidence of debt, and it is now to be decided whether a plain un-

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dertaking can be avoided, by supposing the agreement, the parties, and the contingency on which the defendant was to be liable, to be anything else than what the evidence proves them to have been. Some cases decided in our own courts, but which were not brought to the consideration of the Common Pleas or of this court, must govern this case.

Thursby Assignee v. Gray, 4 Yeates, 518, decides that a surety is not discharged though the note is not sued when it becomes due. It was there contended that Gray was surety only till the day of payment in the note, &c.; the court decided that whoever is surety, or guarantees payment of a debt, continues liable after the day has passed when the debtor ought to have paid, unless in special cases and circumstances. The notion that a security in a bond or note to pay money at a fixed period, was not liable unless the money was demanded, and if not paid sued for at the end of the period, was again brought before this court in Cope v. Smith, 8 Serg. & Rawle, 110, the matter fully considered, and the doctrine there established, repeatedly recognised since, but not extended. On the principles there settled, the defendant, even if the loan had been for one year, and he had guaranteed the payment, would have continued as much liable after the year had expired as he was at first, and could only be released by giving the plaintiffs express notice to wind up the business as soon as possible, for he would not continue liable any longer. I say he could only have been discharged by such notice, but I do not mean to be understood as laying it down that he could in this case have extricated himself from his engagement by such notice. See Gibbs v. Cannon, 9 Serg. & Rawle, 199. Although the money was borrowed not for the defendant but for a company, yet it was borrowed on an express promise by the defendant, that if the company did not supply funds to discharge the debt, he would be personally *bound for one-twelfth part of it. No time was mentioned within which the [*388] loan was to be repaid, and nothing said about its being repaid at one payment, or by instalments. To attempt to insert in the agreement that it was to be paid at sixty days, or three hundred and sixty-five days, and if not then paid or sued for, the defendant to be discharged, is both unjust and unreasonable, and the position, that if plaintiffs were unable to raise the large sum of twelve thousand dollars at once, the defendant might be discharged, is still worse. The defendant, then, continued liable as long as the loan continued, and became liable to the plaintiffs as soon as they had paid the bank, and not before. Pigou v. French, 1 Wash. C. C. Rep. 278. Or at most when they were sued and judgment obtained against them. Gardner v. Grove, 10 Serg. & Rawle, 137. But was he liable to suit as often as

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they paid any part of it, or was it one entire contract, and the defendant's responsibility to be determined and settled in one suit, after the whole extent of liability was ascertained? I know of no case in which it has been decided that a surety as often as he pays a small part of a debt for his principal, can sue that principal, and I know of no case where it has been attempted. I do not say there may not be a contract in which a guarantor may sue as often as he is obliged to pay, but I do say this is not such a contract. It is very plain; the stock of the company was first pledged, and if that should not be sufficient, each of the subscribers agree to guaranty one-twelfth of the sum borrowed.

Overton v. Tracey, 14 Serg. & Rawle, 311, was a stronger case than this. Overton in payment for land purchased by him, assigned a bond payable by six annual instalments, and a mortgage to secure the money due on the bond, and asserted that Drew, the obligor and mortgagor was a man of property and would pay the instalments as they fell due, and if he did not do so, Overton said that he would pay them; but he also said the property mortgaged was a sufficient security for the money, and if it did not produce the money he would make it good. Tracey wanted this guarantee put in writing, but Overton said, "here are witnesses to my engagement, it is as good as if written." The witnesses agreed in substance; contradicted each other in no respect, but each mentioned matters not stated by the other. On the testimony of the first, perhaps, Tracey could have sued Overton on each instalment; but on that of the second, perhaps, he could not sue until after the mortgage was resorted to; in other words, the liability arose on two contingencies—Drew failing to pay, and the mortgage not producing the money. Drew never was worth the amount of one instalment, and the land mortgaged was not worth the costs of suing the mortgage. It was contended, first, that Overton, on the evidence, was liable to an action for deceit, and six years having elapsed and suit not being brought, no other action could lie—and that at all events he was liable as each instalment fell due, and could only be held to answer for those within six years before suit was brought. The Court of Common Pleas decided against the defendant on both *points, and their judgment was affirmed. [389] Although the statute of limitations would, after six years, have barred the action for deceit, it did not bar the *assumpsit* on the guarantee, and this is often the case. A man takes my goods, and I may bring trespass; after four or five years he sells them and receives the price; I may bring *assumpsit* for money had and received, though my action of trespass would be barred. On the other point Judge Duncan

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put it on the testimony of the other witness, who proved the guaranty of the sufficiency of the mortgage, and that if suit was brought within six years after that failed, the statute was no bar. That is enough for the plaintiffs in this case. The meaning of the agreement cannot be misunderstood; to entitle the plaintiffs at all, they must have been damnified by their engagement for this company, and the amount of their damage was to be compensated, first, out of the stock of the company, and if that failed the defendant was to pay one-twelfth until the whole money was paid to the bank by the plaintiffs. It could not be known what the situation of the company would be. If the defendant could have proved at the trial, that the company, on the day when this suit was commenced, had stock which would sell for the amount of the plaintiff's claim, the plaintiffs must have failed, precisely as in the case cited, the plaintiffs would have failed, if proof had been made that the mortgage was available. I am then, of opinion, that this contract was an entire one; that the cause of action arose when the whole money was paid and the company then insolvent, (for its materials in roads and bridges could not be dug up, or pulled down and sold,) and that if suit was brought within six years of that time, the statute of limitations was not a bar. As to this last point, see *Williams v. Moore*, 9 Pick. 434.

Some expressions, "that sureties are favoured," and the like, seem to have introduced a little confusion on that subject. Sureties are not bound beyond the plain intent and meaning of their engagement; but so far they are bound equally as the principal. Where security is required and given, it is because without it the money cannot be gotten. It would be unjust that the surety should not comply with his engagement. The person who gets and uses the money or property, may be bound to pay for it, and this may be evidenced by a note, a parol promise, or a bond; that note or bond may be void for want of legal form. The law will imply a promise from him who got and used the property, or equity will reform the instrument in some cases and make it binding on him who enjoyed the benefit; but this is not done to affect the surety unless the defect of the instrument was occasioned by him, or some fault can be attached to him; but if the instrument of writing is formal, plain, and legal, and expresses clearly the obligations entered into by the parties, they are bound to comply with them according to their true import; and this extends as well to sureties as principals. See 3 Yeates, 344; 4 Dall. 79; *Roth v. Miller*, 15 Serg. & Rawle, 100. And as to the liability of guarantor, see *Gibbs v. Cannon*, 9 Serg. & Rawle, 199.

*This view of the matter makes it unnecessary to remark on the parol testimony, and the judge's construe- [*390]

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tion of it. It is not usual that a man is bound to pay by his silence, and can only happen where another in his presence and hearing speaks in his behalf and name, and alleges authority to do so, and is not contradicted. I would not put the same construction on the testimony which the judge did; but in the view taken of the cause, no new agreement by the defendant was necessary; his first agreement in writing, in terms, and according to the obvious intent and meaning of all parties to it bound him, and continued to bind him for six years after the last payment was made by the plaintiffs, and in less than that time suit was brought.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Wh. 300; 2 Wh. 347; 8 W. 274; 4 H. 159; 7 C. 156; 13 S. 133; 28 S. 337; 10 W. N. C. 362.

[PHILADELPHIA, FEBRUARY 13, 1832.]

Wharton and Another *against* Hudson.

IN ERROR.

The legislatures of New Jersey and Pennsylvania having passed an act to incorporate a company, styled "The Communication Company," both states appointed the same persons commissioners, who constituted the defendants agents to obtain subscriptions to the stock, and agreed to give them one per cent. on the amount of the subscriptions they obtained. The plaintiff subscribed for twenty shares of the stock, and paid the first instalment on each share. A sufficient number of shares were subscribed to entitle the company to letters patent from New Jersey, which were accordingly granted, but none were obtained from Pennsylvania. The plaintiff brought an action of *assumpsit* against the defendants to recover back the money paid by him on his subscription, which the defendants claimed to retain towards the payment of a debt due to them by the commissioners for services in relation to their agency;

Held, that the plaintiff was entitled to recover back the amount paid by him, deducting its proportion of all reasonable charges.

WRIT of error to the District Court, for the City and County of Philadelphia, in an action of *assumpsit* brought by the defendant in error, Edward Hudson, against Fishbourn Wharton, and Thomas F. Wharton, to recover the sum of one hundred dollars paid by the plaintiff to the defendants under the following circumstances:

Laws were passed by the state of New Jersey on the 26th of January, 1819, and 23d of February, 1820, and by the state of Pennsylvania, on the 6th of March, 1820, to incorporate a company styled "The Pennsylvania and New Jersey Communication

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Company." By *the acts of both states, the same commissioners were appointed, who constituted the defend- [*391] ants their agents for the purpose of obtaining subscriptions to the stock of the company. The books were deposited at their office, and they were to receive a commission of one per cent. on the amount of the subscriptions they obtained. The plaintiff on the 20th of April, 1820, subscribed for twenty shares of the stock, and paid five dollars on each share, amounting in the whole to one hundred dollars. A sufficient number of shares was subscribed for, to obtain letters patent of incorporation from the state of New Jersey, which were accordingly granted, but none were obtained from the state of Pennsylvania. The defendants claimed a right to retain the funds in their hands, consisting of the subscriptions of the plaintiff and others towards the payment of a debt due to them by the commissioners for their services in relation to their agency.

The following errors in the charge of the court below to the jury, were assigned in this court, viz. :

First. The court erred in charging the jury in answer to the first point proposed by the defendant's counsel, that an action for money had and received will lie against an agent where his principal is known.

Second. The court erred in stating in answer to the second point proposed by the defendant's counsel, that an action would lie against the defendants, notwithstanding the act of assembly.

Third. The court erred in their answer to their third point proposed by the counsel of the defendants, in saying that the acts of assembly of the state of New Jersey, which had been given in evidence, were not in the way of the plaintiff's action.

Fourth. The court erred in stating, in answer to the fourth point proposed, that the action could be maintained by the plaintiff notwithstanding the incorporation of the company by the state of New Jersey.

Fifth. That the court erred in charging the jury, that if the money claimed in this suit has remained in the defendant's hands, the plaintiff shall recover.

Chew, for the plaintiff in error, cited 3 P. Wms. 77 ; 2 Halst. 1 ; 1 Selw. N. P. 171 ; 2 Ld. Ray. 210 ; 17 Serg. & Rawle, 345.

J. Randall, *contra*, was stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—The procurement of a charter from New Jersey, is insufficient to affect the plaintiff's right to a return of

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his subscription, arising, as it does, from the failure of an enterprise that could be prosecuted only under the joint authority of that state and Pennsylvania. The consideration having failed, with the effort to procure a correspondent charter from the latter, the plaintiff was entitled to retribution from some one; and why not from the defendants in whose hands his money had remained? Because, say they, an action of *indebitatus assumpsit* is not maintainable against an agent whose principal is known.

[*392] Such, however, is not the law where the money *has not been paid over without notice, the action lying on the promise to pay which the law implies wherever one man has the money of another. The question then is, whether the plaintiff's money is in the hands of the defendants, in contemplation of law. Pursuant to an agreement with their principals, by which they were to have one per cent. on all subscriptions received, they claim to retain for the balance of their account. But the plaintiff claiming paramount to the principals, is not to be affected by their agreement. Between themselves, the principals and their agents might determine their respective claims to the money; but not the claim of a third person to whom they all stand in the same relation, neither being allowed to set up a defence that would not be equally available in favour of the rest. There may perhaps be such a thing as a constructive payment over by an appropriation to a balance in the agent's favour on a settlement of his account before notice of an adverse claim, especially if he would be put in a worse situation than he was before, by being compelled to resort to the principal on original grounds; but no such appropriation is pretended here. The money is, no doubt, subject to its proportion of all reasonable charges in the agent's hands; and that matter is regulated in the particular instance, by the act passed on the part of Pennsylvania which directs the money to be returned in the event of a failure, deducting the necessary expenses; yet the court charged that the plaintiff could demand no more from the defendants than the commissioners could have demanded from them had the project taken effect, thus subjecting the plaintiff's money, not merely to its own share of the general burthen, but to the balance of the agent's account. The error however was in favour of the defendants, who have no right to come here as complainants in consequence of it, especially as it was entirely consistent with the direction which they themselves had prayed. It is said, however, the act gives an action against the commissioners, and that by the act of 1806, statutory remedies must be exclusively pursued. It however gives no new remedy; and least of all a remedy against the agents, whose case is left as it

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stood at the common law. The errors therefore are not sustained.

Judgment affirmed.

Cited by Counsel, 5 W. N. C. 248.

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Heron *against* Hoffner and Others.

IN ERROR.

Testator appointed his wife and his two sons executors of his will, by which he authorized them, and the survivors and survivor of them his said executors, the better to enable them to pay his debts and legacies, and to make division of his estate among his residuary devisees, to sell and dispose of all or any part, of his real estate at public or private sale, &c. His widow did not join in making probate of the will and taking out letters testamentary, which was done by the sons. She did not appear before the register, or make or send to him any renunciation either written or verbal. It did not appear she was asked to join in proving the will and taking out letters testamentary, or that any notice was given to her of the time of its being done by the others. The other two executors agreed to sell a lot of ground, part of the estate of the testator, to the defendant, and a deed to him from the three executors was written, but the widow refused to execute it. A deed was afterwards executed by the other two executors and tendered to the defendant, who refused to accept it, saying at the time, that he had no money to pay for the property. An action of *assumpsit* was then brought against the defendant, in the name of the three executors, in which the declaration set forth the sale of the lot by the sons, two of the plaintiffs; that the defendant upon his contract became liable to pay them the price agreed upon, and concluded by assigning a breach in the non-payment thereof to the said two executors. After the trial of the cause in the court below, the widow signed and sealed a renunciation as executrix.

Held, that the action could not be supported.

Held, also, that the deed tendered by the two executors to the defendant, was not sufficient to vest in him a good title to the lot.

A widow's claim to dower may be barred by her election, by matter *in pais*, to take a devise in her husband's will.

ERROR to the District Court for the city and county of *Philadelphia*

T. Sergeant, for the plaintiff in error.

Rawle, for defendants in error.

The opinion of the court, which renders any other statement of the case unnecessary, was delivered by

KENNEDY, J.—This was a writ of error to the District Court of the city and county of Philadelphia. The defendants in error were the plaintiffs below, and brought this action against

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the plaintiff in error to recover seven hundred and five dollars, the price of a lot of ground sold by George and John Hoffner, two of the plaintiffs below, as executors of the last will and testament of George Hoffner, Senior, deceased. The clause in the will under which it is alleged that the sale was made, is in the following words: "I nominate and appoint my said wife Catharine, and my sons George and John Hoffner, executors of this my last will and testament, and I authorize them and the survivors and survivor of them my said executors, the better to enable them to pay my debts and the legacies herein given, [*394] and to *make division of my estate among my residuary devisees, to sell and dispose of all or any part of my real estate, either at public or private sale for the best price that can be reasonably had or gotten for the same, and to grant and convey the same to the purchaser, or purchasers thereof his or her or their heirs and assigns forever."

The declaration is in *assumpsit*, in which the plaintiff in error is said to be attached to answer Catharine Hoffner, George Hoffner, and John Hoffner, executors of the last will and testament of George Hoffner, Senior, deceased; after which these three plaintiffs below all join in making complaint, and setting forth the cause of action: but the sale of the lot for seven hundred and five dollars is stated to have been made only by George and John Hoffner, two of the plaintiffs below, and that Heron, the defendant below, upon his contract with them became liable to pay to them the seven hundred and five dollars, and being so liable, in consideration thereof, promised to pay to them, the said George and John, the said seven hundred and five dollars, when, &c., and concludes by assigning a breach in the non-payment of the seven hundred and five dollars to them the said George and John, &c.

Catharine Hoffner did not join in making probate of the will and taking out letters testamentary. This was done by George and John Hoffner, the sons. Catharine did not appear before the register at all, nor make nor send any renunciation to him either written or verbal, until after this suit was tried in the court below. It did not appear that she was even asked to join in proving the will and taking out letters testamentary, or had any notice given to her at the time of its being done by the others. Neither did it appear that she had been consulted about selling the lot or that she had had anything to do with it. Sometime after the sale was made, a deed of conveyance from Catharine, George, and John to Heron, was written with a view of being executed by the three executors named in the will. It was presented to Catharine with a request to execute it, but she refused; she said that she had consulted with some of her

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friends, and that they had advised her not to sign any paper. She appeared to be not well pleased, and when pressed to sign the conveyance said, that George and John had taken every thing into their own hands, and that they might go through with it. After the trial of the cause on the 27th of January, 1829, she signed and sealed a renunciation.

The sale of the lot to Heron by George and John Hoffner was fully proved; that the price was seven hundred and five dollars; that a deed of conveyance for the lot executed by George and John Hoffner only to Heron, was tendered to him before the commencement of the action, and that he refused to accept of it, saying at the same time, that he had no money to pay for it.

It was contended by the counsel for the plaintiff in error in the court below, that if the sale was valid, Catharine Hoffner was not a party to it, and ought not therefore to have been joined with George and John Hoffner as plaintiff in bringing the suit. The court *however told the jury that she [*395] was rightly joined with the others as a plaintiff in bringing the suit: That this would have been right even in case she had renounced, and *a fortiori* so since she had only refused to do a particular act, that the law was, that where there were several executors, and one renounced, he might come in afterwards and join his fellows: That the suit was always, and perhaps must be, in the name of all. This is the ground of the first error assigned.

The court below seem to have fallen into an error by viewing and considering this action as one brought by the plaintiffs below in *auter droit*. It is not so; so far from being founded upon a contract or transaction to which the testator in his lifetime was a party, which is the true test of a suit being in *auter droit*, that it is for a breach of a contract made by two of the defendants in error with the plaintiff in error. But as Catharine Hoffner was no party, and did not join with George and John Hoffner in selling the lot, but on the contrary refused, she ought not to have been joined with them in bringing the suit.

The proving of the will by one executor, where there are several, is sufficient no doubt for all; and any one or either of them may act afterwards as if they had all joined in proving it. Either may receive debts owing to the testator's estate, and give acquittances for or release them, 9 Co. 34-40, Hensloe's case, and 5 Co. 28, Middleton's case. And if an action be brought, it ought to be brought in all their names, notwithstanding the refusal. Touch. of Prec. 29; Went Exr. by Jeremý, 95. But this has a reference to actions brought in *auter droit*, and is not applicable to causes growing out of contracts made and entered

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into by the acting executors only, and more especially as in this case where the refusing executrix positively refused to join in the contract, or to have anything to do with it. The rule that the *probata* must correspond with and support the *allegata* is applicable in all cases. But in this case the suit is brought in the names of three plaintiffs below, and the proof is that the contract upon which the plaintiffs there claimed to recover, was made only by and with two of the three. It is however, contended, by the counsel for the defendants in error, that the joining of Catharine Hoffner with George and John, if wrong, ought to have been pleaded by the plaintiff in error in abatement, and 1 Chitty's Pl. 12, has been cited to sustain this proposition. It is there said, that if one only of two executors bring a suit, the defendant may pray *oyer* of the probate, and if he wishes to take advantage of the omission he must plead it in abatement. To this it may be replied, that this is only when a suit is brought in *auter droit*, and not in the plaintiff's own right; for in that, as Chitty observes, the omission would be cause of nonsuit, pages 7 and 14. In the next place this is not the case of a non-joinder, but a mis-joinder; and it is a rule well established in all cases, as well in case of plaintiffs as of defendants where the suit is founded upon a contract, that if any one or more join, or be joined in it who were not parties to the contract, and had no legal interest *in it, or are not the representatives of those who were, in case of the death of either party to the contract, such suit cannot be sustained, 1 Chitty's Pl. 7, 8, 33-36. The reason of this rule is as strong with respect to plaintiffs if not more so, than it is as to the defendants; because every person who is a party to a contract, must, from the very nature of the thing itself, know all who are associated with him, either in interest or in form, in making the contract, and if he afterwards bring a suit upon it, he is bound not to join with himself those who were not joined with him in making the contract, and had no interest in it whatever. But with respect to those who may be liable to him upon the contract, he may not know them all, yet he will not be permitted to harass and vex men with suits against whom he can adduce no evidence, and if he does join some as defendants against whom he can produce no evidence, he must fail in his suit and submit to the penalty of paying the costs of it.

There is an incongruity upon the face of the declaration in this case; and the irregularity of which we have been speaking, is there manifest. The complaint is made by three, and the defendant in the court below is called upon to answer the complaint of three, yet the cause of action set out is the breach of a promise made to two only of the three, in which it does not

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appear that the third had any interest either legal or equitable. I think, therefore, that there was not only error in the charge of the court below, but also on the face of the declaration itself, in regard to this point.

There is no error in that part of the charge of the court below, to which the second exception has a reference. It has been decided by this court in the case of *Cauffman v. Cauffman*, 17 Serg. & Rawle, 16, that a widow to whom a legacy or devise is given by the will of her husband, which if accepted of by her, would be a bar either under the will, or under our act of assembly, to all future claim of dower at law, may make her election *in pais*, and shall be afterwards bound by it, where it is done freely and deliberately by her with a full knowledge of the facts and her rights; as demanding and receiving payment of a legacy from the executors, taking possession of a devise, or accepting of an assignment of dower, and taking possession of it, or prosecuting and recovering by suit a legacy, devise, or dower at law, all or any of which acts, would be an election, and sufficient to bind her afterwards without a proceeding by citation from the Orphans' Court of the county, as is prescribed by the act of assembly of the 1st of April, 1811. The object of this act in that particular, was to provide a mode whereby the election of the widow might be compelled, and made manifest in cases of neglect or unwillingness to do so, or where any uncertainty existed about its having been done.

The third and only remaining error, is to the charge of the court in directing the jury that the deed of conveyance executed by George Hoffner and John Hoffner, two only of the executors named in the testator's will, and not by Catharine Hoffner, the executrix therein also named, *and tendered to the plaintiff in error, was sufficient to vest in him a good [*397] title to the lot. From the words of the will I think it clear that it was the intention of the testator to give his executors *virtute officii*, power to sell and convey his real estate, of which this lot was a part. He first nominates and then appoints them by name, as must necessarily be the case if done at all, and then directs in these words, "I authorize them." Now the next antecedent to the pronoun "them" is the word "executors," and would in grammatical construction be precisely the same as if he, after naming and appointing his executors, had used these words, "I authorize my executors," or the "executors of this my last will and testament and the survivors or survivor of them my said executors, &c., to sell, &c." If anything further were wanting to evince this intention, and to prove the propriety of this construction, it is the object, at least in part, as declared by the will itself, for which this power was given, and to be executed, which

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was to raise money to pay the testator's debts, which belonged particularly to the office of the executors. The present case is much more clear, that it was the intention of the testator to grant this authority to his executors, to be exercised by them *virtute officii*, than it was in the case of *Zebach v. Smith*, 3 Binn. 69, where it was held, that a sale made by one of three executors, under a power in the will was good, the other two having renounced immediately after the death of the testator and before the sale. But since the passage of the act of assembly of the 12th of March, 1800, this distinction in most cases may not be considered a very important one, because by the provisions of that act, where two or more executors are authorized by their individual and proper names, to sell and convey the real estate of the testator, or any portion of it, and one or more of them should refuse to join in proving the will, or renounce, the other or others of them, who prove the will, and consent to act, may execute the power granted to sell the real estate. It is argued by the counsel for the defendants in error in this case, that Catharine Hoffner did refuse to join in the probate and execution of the will, and never did do any act whatever as executrix under the will, and that the sale made of the lot to the plaintiff in error by George and John Hoffner, the two executors who proved the will, is therefore good either under a proper construction of the will itself, or of the act of assembly. This raises the question as to what does amount to a refusal or renunciation mentioned in this act of assembly. It has been argued by the counsel for the defendants in error, that a mere verbal refusal made *in pais*, is sufficient without appearing before the register of wills and having a record made by him of it; and such a refusal is sufficient without any citation having been issued by the register, and served upon the refusing executor, requiring him or her to appear before the register within a given time, and either to accept of the executorship or renounce it. For the second section of the act declares "that in all cases where such devises (that is, where the testator has or shall thereafter devise [*398] his real estate or any part of *it to his executors to be sold, or has authorized and directed, or shall authorize and direct the same to be sold by his executors) have been or shall be made, or such authority and direction given, if one or more of such executors hath or have refused, or shall hereafter refuse, or hath or have renounced, or shall renounce, it shall and may be lawful for the acting executor or executors to sell and convey such real estate and act otherwise respecting the same as fully and completely as he, she, or they, together with such refusing or renouncing executor or executors would be empowered to do, if he, she, or they had not refused or renounced."

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Previously to the passage of this act, the terms “refuse” and “renounce,” had been used in reference to a course of proceeding practised by the ordinary in England, and by the Register of Wills in Pennsylvania, to ascertain, and to have it distinctly known, whether executors who neglected to appear before the ordinary or Register and prove the will, or renounce or refuse to take upon them the office of an executor, were willing or not willing to prove the will, and take out letters testamentary upon it; and had, as I conceive, in this respect acquired a meaning of a fixed and determinate character. The sense in which they were understood before and at the passage of the act is the one which the legislature must have intended should be given to them in expounding it. Here the Register of Wills is substituted for the ordinary in England, whence we have borrowed a practice that became the law of this state before the passage of the act, as well as since, for the Register, before granting administration, where a will is made and executors named, if he knew of it, to send a citation to the executors to come before him, and prove it. If they neglect or refuse to come, or do appear but refuse to take out letters testamentary, and take upon them the execution of the will, the Register in either case, must then commit administration *cum testamento annexo* to the next of kin of the testator, or perhaps to the residuary or principal legatees in the will, as they would have an interest in making the most of the estate by care and good management. If the executors appear before the Register, but refuse to prove the will or renounce, it is his duty to make a record of it; so if they neglect or refuse to appear upon a citation being issued and served upon them, a record of the issuing of the citation, service, and neglect to appear and prove the will must be made by the Register. A mere verbal refusal made *in pais* or before neighbours, and proved by them, without a record being made of it by the Register, will not justify him in committing administration *cum testamento annexo*, nor be such a refusal or renunciation as is contemplated by the act of assembly. Went. Ex. by Jeremy, 88; 3 Bac. Abr. tit. Executors, 43; Tol. Exr. 40, 41. Executors may not only renounce in person before the Register, but by proxy, or by letter addressed or sent to him, of which he ought to make a record. Tol. Exr. by Ingraham, 42; Went. Ex. by Jeremy, 88–9. No particular form is required in making out a renunciation; anything reduced to writing which manifests the intention to renounce or to refuse undertaking the execution of the will is sufficient, as *ego dico me nolle* [*399] *esse heredem*, Sir H. Goodyer’s case, 1 Lev. 135. So where the executors wrote a letter to the judge of the prerogative court, that they could not attend to the execution of the will,

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and desired him to commit administration to Henry Goodyer, the next of kin to the testator, it was held a sufficient renunciation. And in the case of the Commonwealth for Huston v. Mateer, 16 Serg. & Rawle, 418, a letter written by the executors named in the will, declining or refusing to appear before the Register to make probate and take out letters testamentary, was held a sufficient renunciation or refusal to warrant him in committing administration *cum testamento annexo*. See Broker v. Charter, Cro. Eliz. 92. It does not appear from any part of the act of assembly in relation to this matter, that it was the intention of the legislature to use these terms "refuse" and "renounce," in a sense different from that in which they had been previously used, when applied to the case of executors named in a will, refusing to prove it or renouncing their executorship. The act was not passed for the purpose of making any change in the established mode or manner and course of proceeding by the Register to ascertain whether the executors named in the will would prove it or not, or intended to renounce. The great object of it was to prevent a failure of the execution of the powers granted in the will to the executors therein named, as often as they or any of them should renounce or refuse to prove the will. And the third section shows this so clearly that it is impossible to doubt about it; because by it the administrators *cum testamento annexo* who had been commissioned before the passage of the act, upon the refusal or renunciation of the executors are expressly embraced. Now the refusal or renunciation spoken of here must necessarily mean such as had justified the Register in committing administration with the will annexed anterior to the passage of the act; the nature of which has already been shown and established. Then this section proceeds next to give the same authority to the administrators with the will annexed, in all subsequent cases where commissions shall be granted by the Register of wills in cases of refusal or renunciation of the executors or any of them, using the same terms without variation, and of course embracing those administrators *cum testamento annexo*, who should be appointed by the same course of proceeding, and upon similar events as was customary before the act. The propriety and expediency of this course, of having a record made of the refusal or renunciation of executors who decline or refuse to take upon them the execution of the will, and disregarding and holding insufficient a mere verbal refusal made *in pais*, I think cannot be questioned. It is calculated to promote the intention and wishes of the testator in having his will executed by those whom he has designated for that purpose, if they should be willing to undertake; if, however, they should be unwilling, it is well calculated to have

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that fact ascertained with certainty, so as to prevent mistake or misapprehension in *respect to it, which might, and no doubt would, often occur if parol evidence of a verbal [*400] refusal were to be received and considered sufficient. In short, it prevents litigation.

Now, as Catharine Hoffner never did refuse or renounce otherwise than verbally *in pais*, without any record or writing being made of it whatever, until long after the sale was made of the lot to the plaintiff in error by George and John Hoffner, nor indeed until after this suit was tried in the court below; and having refused expressly to confirm the sale by joining in the execution of a deed of conveyance to the purchaser, I consider that the power granted in the will to sell the lot was not well executed, and that the deed of conveyance which was tendered to Heron did not vest in him a title to the lot. It has, however, been urged by the learned counsel for the defendants in error, that as the plaintiff in error did not make this or any objection of the kind to the deed when tendered, he thereby waived it, and cannot make it now. It is true that the purchaser of property who, by the terms of his contract, has a right to require a deed of conveyance at the time fixed for paying the purchase-money, may dispense with the tender of it by the vendor who comes to demand the purchase-money, as by declaring that he wants no deed and will not pay the purchase-money upon any terms, nor accept of a deed of conveyance. By doing so he will subject himself to an action at the suit of the vendor, and the recovery of damages; but still, I apprehend, that the vendor, when he proceeds to recover the purchase-money, ought at least to show that he had it in his power to make a good title, because he will be bound to make it upon the payment of the purchase-money. It would be gross injustice were it otherwise. Here the vendors were not only unable to make a good title, but there was a radical defect in the contract for the sale of the lot for want of a power at the time on the part of the vendors to make such a contract. The obligation of every contract must be reciprocal, and unless it was binding upon George and John Hoffner, it was not so upon Heron. The vendors could not support the action, I think, without being able to make, at the time of its commencement, a good title to the vendee.

The judgment of the court below is reversed.

Cited by Counsel, 1 Wh. 497; 5 Wh. 63; 3 W. 187; 5 W. 165; 9 W. 409; 1 W. & S. 164; 4 W. & S. 319; 7 W. & S. 239; 8 Barr, 126; 2 J. 70; 1 H. 367; 7 H. 127; 1 C. 66; 15 S. 484; 21 S. 52, 470; 25 S. 154; 9 N. 342; 14 N. 315; 7 W. N. C. 42; 13 W. N. C. 15.

Cited by the Court, 8 Barr, 419.

In 11 N. 226, this case was said to have been the settled law for half a century, and was followed and re-affirmed.

[*401]

*[PHILADELPHIA, FEBRUARY 13, 1832.]

Wood against Vanarsdale.

APPEAL.

R. issued an execution against V. and levied on personal property. While the levy was pending, V. made a general assignment to M. and N., who paid the amount of the execution to the sheriff, who paid it over to R., the plaintiff. R.'s attorney afterwards, at the request of M.'s attorney, but without the authority of R., assigned the judgment to M., who assigned it to O. Afterwards O.'s attorney directed the sheriff to levy on V.'s real estate. The sheriff returned no levy on the personal estate of V., but a levy on his real estate, which was afterwards sold under an elder judgment. After payment of prior incumbrances, there remained a balance in court which was claimed by O, by virtue of R.'s assignment to him. Held, that the payment to the sheriff by M. and N. was a satisfaction of the judgment; that no assignment of it by R.'s attorney, without his authority, could resuscitate it, and consequently, that O, the assignee, was not entitled to the balance of money in court.

To constitute a good levy on personal property, it is not necessary, that an inventory should in the first instance be made of it, or that the sheriff should immediately remove the goods, or put a person in possession of them. If they are within the power and control of the sheriff when the levy is made, it will be good, if followed up within a reasonable time by his taking possession of them in such a manner, as to apprise everybody of the fact that they have been taken in execution.

THIS was an appeal from the decision of the District Court for the city and county of *Philadelphia*, relative to the distribution of money arising from the sale, by the sheriff, of certain real estate belonging to the defendant. The property was sold under a writ of *venditioni exponas*, issued by the plaintiff in this suit, for the sum of nine thousand six hundred and seventy-five dollars, of which there remained for distribution, after payment of liens and judgments, according to their legal priority, the sum of four hundred and thirty-nine dollars and seventy-five cents. This sum was claimed by John Moss, assignee of Richard Rowley, a judgment creditor, but the court rejected his claim, upon which he appealed to this court.

The following are the material facts of the case:

Richard Rowley, on the 1st of March, 1827, obtained two judgments against the defendant Vanarsdale, in the District Court for the city and county of Philadelphia, as of March Term, 1827, one of them No. 411, for one thousand and thirty-one dollars and forty-seven cents, payable in one year; the other, No. 412, for one thousand four hundred and eighty-three dollars and forty-seven cents, payable in three equal instalments of four, eight, and twelve months. The first instalment of the last mentioned judgment was paid. When the second became due, the

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plaintiff, Rowley, on the 20th of November, 1827, issued *an execution and delivered it to the sheriff, who [*402] levied upon the goods of the defendant, as was alleged by Rowley, but denied by his assignee Moss. The circumstances attending the alleged levy were stated in the deposition of William Heston, a sheriff's officer, which was the only evidence on the subject. From this deposition which was objected to by Moss, as inadmissible, but admitted by the court, it appeared that a *fiery facias* in the case of Rowley v. Vanarsdale, was placed in his hands by the sheriff, on the 20th of November, 1827. In the afternoon of that day, he went to the defendant's store, at the corner of Arch and Seventh streets, and informed him that he had an execution against him, which he requested him to satisfy. The defendant being unable to satisfy it, the deponent immediately levied on the goods in the store, of which there appeared to be a large amount. After the levy had been made, the deponent had a conversation with the defendant, who stated that a short time before he had a conversation with the counsel of the execution creditor, who had induced him to believe that he would not proceed in that way. He added, that if he had suspected such a course would have been pursued, he would have disappointed him by making an assignment; that he had been, and then was straining every nerve to pay his creditors, and they knew it, and that he was not retaining a single dollar for himself. After the deponent had made the levy as above stated, and had the above-mentioned conversation with the defendant, he returned to the sheriff's office. On the same afternoon he was directed by the sheriff to go to the defendant's house in Spruce street. He went there about eight o'clock in the evening, when he saw the defendant and levied upon his household furniture: there was a good deal of elegant furniture in the house at the time, and deponent took an inventory of the principal part of it. He took no inventory of the goods in the store; left no person in possession of them, and was directed by the sheriff to leave no person in possession of them. None of the store goods, or household furniture were removed. The alleged levy remained in the situation thus described until Vanarsdale on the 22d of November, 1827, made a general assignment of his property to Thomas C. Maybury and Joseph L. Moss, in trust for the benefit of his creditors. On the 26th of the same month, the assignees of Vanarsdale, who were creditors and provided for by his assignment, paid the amount of the execution to the sheriff, who paid it over to the plaintiff's attorney, and on the 29th Morgan J. Rhees, Esq., the attorney of the plaintiff Rowley, executed an assignment of the judgment, so far as respected the second instalment, to Thomas C. Maybury, who assigned it to John Moss. Mr.

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Randall, the attorney of Moss, directed the sheriff to levy on the real estate of the defendant. The sheriff of his own accord, and without directions from any one, returned no levy on the personal estate of the defendant, but a levy on his real estate, which was afterwards sold under a prior judgment. Moss [*403] claimed to be paid out of the proceeds of sale, the *amount of the second instalment of the judgment, No. 412, by virtue of the assignment to him, contending that it was unsatisfied. This was opposed by subsequent judgment creditors of the defendant, and by Rowley, who held the judgment, No. 411, of the same date as the other, on the ground that the assignment to Moss, was made under mistake, without consideration, and passed no interest to the assignee; and also on the ground, that the proceeding which had taken place under the execution issued for the second instalment of that judgment, amounted to satisfaction.

The District Court ordered the money remaining in court to be distributed among the contemporaneous and subsequent judgment creditors of Vanarsdale, from which order Moss appealed to the Supreme Court, where he assigned the following specifications of error in the proceedings in the court below, viz.:

First. The court below erred in admitting the deposition of William Heston.

Second. The court below erred in refusing to permit John Moss to receive the amount of the second instalment of the judgment of Richard Rowley, assigned to the said Moss.

Third. The court below erred in directing the balance of money in court to be distributed among the other judgment creditors of the defendant to the exclusion of the said John Moss.

J. Randall, for the appellant.

D. P. Brown, *contra*.

The opinion of the court was delivered by

KENNEDY, J.—This case is considered as falling within the principle decided by this court in the case of *Hunt v. Breeding*, 12 Serg. & Rawle, 37.

On the 20th of November, 1827, Richard Rowley issued a *fiery facias* upon his judgment of fourteen hundred and eighty-three dollars and seventy-five cents, against Vanarsdale, with directions to the sheriff, to levy the second instalment, or one-third of the amount of the judgment which had become payable, the first instalment having been paid. This writ of *fiery facias* was put into the hands of the sheriff to whom it was directed on the same day. He immediately called at the store of the defendant in the execution, told him of its being in his hands, and

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the defendant signifying no disposition to pay it, he made a levy upon the goods in the store, of more than a value sufficient to satisfy the amount of the execution, of which he gave the defendant notice. He also levied upon some part of the defendant's household furniture, of which he made an inventory, but made no inventory of the goods levied on in the store; nor did he remove any of them. The plaintiff, upon the sheriff's telling him what he had done, told him that he need not remove the goods without further orders. The sheriff did not shut up the store, nor did he put any one in possession of it. After the sheriff made this *levy, the defendant in the execution, [*404] upon the 2d day of November, made an assignment by deed of all his property, including the goods levied on, to Thomas C. Maybury and Joseph L. Moss, in trust for the payment of his creditors therein mentioned. Maybury and Moss were among the number provided for by the deed of assignment, and on the 26th of the same month paid to the sheriff the amount of the execution, and he paid it over to the plaintiff's attorney. Afterwards, on the 29th of the month, the plaintiff's attorney, at the solicitation of Maybury, or his attorney Mr. Randall, assigned the judgment so far as it has been paid by Maybury, to him, and he again assigned it to John Moss, the father of Joseph L. Moss. Rowley's attorney, however, told Maybury or his attorney, at the time he made the assignment, it would do him no good, and it must be understood that it was not to prejudice his client Rowley in the collection of what was still owing to him. After this Mr. Randall, as the attorney of Maybury or Moss, without any regard to the levy which had been made on the goods under the execution, directed the sheriff to levy on the real estate of the defendant Vanarsdale; and he accordingly did so, and made return of the same, but no return of the levy upon the goods. The real estate was afterwards sold upon another execution at the suit of Wood for nine thousand six hundred and seventy-five dollars, a sum not sufficient to pay the whole of the balance coming to Rowley upon his two judgments and the prior liens.

Vanarsdale was displeased with Rowley for issuing his execution, and told the sheriff when he informed him of it, that if he had known that Rowley intended doing so, he would have prevented him from getting any of his personal property, for he would have made an assignment of it for the purpose of satisfying some of his creditors. Rowley by issuing his execution as he did, secured the payment of the second instalment which had become payable upon his judgment against Vanarsdale out of the defendant's personal estate, and thereby made the real estate the better security for the residue of that, and the amount of his

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other judgment of ten hundred and thirty-one dollars and forty-seven cents, which had some months then to run before execution could be issued. Maybury was interested in making the most out of the property which had been assigned to him and Moss by Vanarsdale that he might get payment of his debt. It is therefore easy to see the motive which he had for paying the money coming to Rowley upon his execution. The property assigned to Maybury was bound for the payment of Rowley's execution, and to prevent a sacrifice of it and all further interference with it by the sheriff, he paid the execution. He could be no loser by doing so, as the personal property liable to the execution was of much more value than the amount of it, and he would have a right to reimburse himself the amount of the money paid to the sheriff out of the first moneys that should arise from the sale of the goods to be made by him. This money was not paid to the sheriff, as has been contended by Moss's counsel, under an agreement that Maybury should have

*405] the judgment *to the amount of the execution assigned to him as a security for obtaining a reimbursement of the money. On the contrary, it appears to have been paid in order to prevent a sale of any of the goods being made by the sheriff, who told them before the payment of the money and after the levy, that unless it were paid he would proceed to make it by sale of the property; and upon this it was paid without even the presence of the plaintiff in the execution or his attorney, or any stipulation for an assignment. The assignment was not made until three days afterwards, when it was done as already mentioned, at the request of Maybury's attorney. There is every reason to believe that Rowley wished to have as much of his claim against Vanarsdale paid out of his personal property as he could, and thus improve the security which he had upon the real estate for the balance. No doubt this was his principal reason for issuing his execution, and it is therefore not likely that Rowley would have consented to have taken his money, for which he issued the execution, and have assigned so much of the judgment, keeping it still open and continuing it as a lien upon the real estate of the defendant. He does not appear to have ever given his assent to any such arrangement. Nor do I understand that even his attorney agreed to it as now claimed upon the part of the assignee. I consider the money then paid to the sheriff, as paid in satisfaction of the execution, and that the judgment upon which it was issued was thereby satisfied *pro tanto*, and no subsequent assignment made by Rowley's attorney without an authority from him to do so, could resuscitate this satisfied and extinguished part of the judgment to the prejudice of Rowley's rights. An agreement for this purpose entered into

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between Rowley, Vanarsdale, and Maybury, might have been sufficient, but certainly not without Rowley's consent or authority could his right to have the execution satisfied out of the personal property, and the real estate of the defendant relieved from so much of his claim, be set aside and thrown back again upon the real estate which was not of sufficient value to satisfy the balance of Rowley's judgments. Even if there had been no levy upon the store goods of the defendant in the execution. I consider the payment of the money a satisfaction of the execution, and an extinguishment of the lien of the judgment for so much, and that the decision of the court on the appropriation of the money arising from the real estate, was right and ought to be affirmed.

But I also think there was a levy on the goods of Vanarsdale in this case sufficient to bind Maybury. To constitute a levy upon personal property it is not necessary that there should first be an inventory of it made out; nor is it necessary, perhaps, in all cases, that an inventory should be made out at any time. Neither is it necessary that the sheriff should remove the goods levied on immediately; nor that he put a person in every case, immediately into the possession of them; a reasonable time must be allowed for this, which may be more or less, to be judged of according to attending circumstances. A levy, however, upon such property, cannot be made without the *sheriff has [*406] it within his power and control, or at least within his view; and if having it so, he makes a levy upon it, it will be good if followed up afterwards within a reasonable time, by his taking possession in such manner as to apprise everybody of the fact of its having been taken in execution. The sheriff in this case was in the store, when he made the levy upon the goods, having them full in his view, and completely within his power. Immediately after this was done, within a day or two, Maybury, with full knowledge of the levy, took an assignment of the goods from Vanarsdale, and before the sheriff had had time sufficient to have made out an inventory, and then when the sheriff talked of proceeding with his levy to consummate it, and make a sale, unless the money were paid, Maybury proposed paying the money, and in two or three days afterwards actually did pay it, so that he prevented the sheriff from making an inventory, and taking possession of the goods, which he may presume would have been done, if Maybury had not interfered as he did. Under these circumstances, if Rowley, the plaintiff in the execution, had even agreed to have assigned to Maybury his second instalment, due upon the judgment for which he had issued the execution, upon Maybury's paying the amount of it to him, and the arrangement had been carried into effect, without

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any stipulation or agreement that Maybury should be at liberty to change the levy from the personal to the real estate of the defendant in the execution. I think that Maybury could not have done so. The course which Rowley intended pursuing, was against the personal property; this was clearly and unequivocally indicated, and commenced by the sheriff under the execution, and all made known to Maybury; and under an assignment, without more to him, he would have been bound by what Rowley had caused to be done, and to complete that, and obtain the fruits of it, was all that it could have been said was assigned to him. The levy, in short, was a satisfaction of the judgment, and the assignment at most could only give to Maybury the benefit and fruits of the levy. Hence he was not at liberty to relinquish the levy on the personal estate, and to apply that personal estate under the assignment which he had from Vanarsdale, to the payment of his own debt against Vanarsdale, for which he had no lien upon Vanarsdale's real estate, or if he had any it was subsequent to Rowley's, and to seek satisfaction of the execution assigned to him, out of Vanarsdale's real estate. This view of the case assimilates it to the case of *Hunt v. Breading*, 12 Serg. & Rawle, 37. But it is said that the levy on personal property in the case of *Hunt v. Breading*, was returned by the sheriff and was afterwards set aside by the agreement of the defendant in the execution, and the plaintiff and Hunt, to the prejudice of *Breading*. The return of the levy can make no difference, as appears by the decision of the Supreme Court of New York in the case of *Wood v. Torry*, 6 Wendall, 562.

The judgment of the court below is affirmed.

Cited by Counsel, 5 R. 289; 8 W. 274; 7 W. & S. 135; 8 W. & S. 457; 9 W. & S. 74; 1 Barr, 20; 2 Barr, 94; 8 Barr, 210; 1 H. 427; 10 H. 478; 3 Wr. 286; 6 Wr. 290; 13 Wr. 406; 7 S. 349; 8 S. 79, 117; 27 S. 106; 8 N. 399; 13 N. 174; 5 O. 544, s. c. 13 W. N. C. 208; 13 W. N. C. 152; 14 W. N. C. 480.

Commented on, 1 H. 422.

Cited by the Court, 6 W. 551; 9 Barr. 351; 1 H. 164; 6 C. 360; 1 Wr. 502; 5 Wr. 277; 13 Wr. 78.

To continue the lien of a levy it is not necessary that the sheriff keep actual possession of the property; if it be forthcoming whenever required it is sufficient. The goods can therefore be left in the possession of the debtor, and unless there be fraud this action will not divest the lien: 4 N. 114.

*[PHILADELPHIA, FEBRUARY 13, 1832.]

[*407]

Hart and Another *against* Heilner and Others.

IN ERROR.

One of two plaintiffs in an action of *assumpsit*, brought by them as indorsees of a promissory note, after having, upon the trial, assigned all his interest in the suit to the other, who has paid into court all the costs of suit, may be examined as a witness for the plaintiff to whom he has assigned.

If when a witness is offered, it be perfectly clear from the testimony given in relation to him, that he is interested, the court may reject him, as incompetent, but if his interest be in the least degree doubtful, the court should permit him to be sworn, instructing the jury, that if in their opinion he is interested, they are to pay no regard whatever to his testimony.

ON a writ of error to the District Court for the city and county of *Philadelphia*, it appeared that the plaintiffs in error Thomas and William H. Hart brought this action on a promissory note drawn by Samuel Heilner & Co., dated the 14th of June, 1816, at sixty days after date, for \$405.74 in favour of Conrad Krider, by whom it was indorsed to the plaintiffs. The suit was marked to the use of William H. Hart and in order to introduce Thomas Hart one of the plaintiffs as a witness, the following instrument was drawn up and executed at the bar :

“Hart *v.* Heilner & *et al.*—District Court, March Term, 1826. No. 254.

“For a valuable consideration I hereby assign, transfer, and set over all my right, title, and interest, in the above suit to William H. Hart. Philadelphia, 8th March, 1830.

THOMAS HART. (Seal.)

“Sealed and delivered in the presence of

S. BRASHEARS,
D. P. BROWN.”

The counsel of the plaintiffs, after having read this instrument to the court and paid the costs of suit, offered Thomas Hart as a witness to prove the handwriting of the maker and indorser of the note, and to prove an acknowledgment by the defendants, which would take the case out of the act of limitations. The counsel for the defendants objected to the admission of the witness, and his Honour Judge Hallowell, before whom the cause was tried, after argument, rejected him, for which he gave the following reasons :

“I have more than once expressed my repugnance to the kind of evidence which has been offered in this case, and which has

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been sometimes introduced since the decision of Steele and the Phoenix Insurance *Company, 3 Binn. 306. I have [*408] given my opinion in several cases, to which I refer the counsel and will furnish copies:—Krowse v. Walker, Chester county before me when sitting for Judge Darlington—M'Williams v. Swift, and Lecounte v. Blackwell, Philadelphia county, in which my reasons were given. This case affords as good an opportunity as can occur of bringing the case of Steele v. The Phoenix Insurance Company, and the whole subject again into review before the Supreme Court.

“Here is an action brought by two partners—brothers; finding that they cannot make out their case by other evidence, they mark the suit for the use of one of them; one assigns the claim to the other, pending the action, and even after the jury are sworn, and then offers himself as a witness to make out the case for the other, and avoid the act of limitation. No proof is offered of money paid as the consideration for that assignment, and made under all these circumstances, it is difficult to believe that such a transaction is *bona fide*. I do not know Thomas Hart myself, but I am willing to believe that he is a man of character, but the principle on which he is offered is highly dangerous, and may in other cases open the door to perjury—indeed it is next to impossible for any man to protect himself against the effect of such testimony, so as to guard against fraud, perhaps to his ruin. In Steele against the Phoenix Company, 3 Binn. 314, the Supreme Court thus express themselves—‘where a man assigns a particular thing, especially pending the action, and then comes forward to make out the case by his own testimony, he should be watched narrowly, and the court will admit or reject it according to the conviction of the assignment being a *bona fide* transaction or not.’

“I am not convinced that this transaction is *bona fide*, but believe it to be colourable, and that the recovery, if it takes place, will enure to the benefit of both the plaintiffs. Exercising therefore the right I possess according to the opinion of the Supreme Court, I reject Thomas Hart as a witness in this case.”

To this opinion the plaintiff's counsel excepted, and having no evidence to counteract the effect, the plea of the act of limitations which the judge instructed the jury was a flat bar to the plaintiff's recovery in this case, a verdict was rendered for the defendants.

When the cause came on for argument here, the court called on *Kittera* for the defendants in error to support the opinion of the court below, and after having heard him, they declined hearing *Brashears* and *D. P. Brown* who were of counsel for the plaintiffs in error.

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The opinion of the court was delivered by

KENNEDY, J.—The only question to be decided in this case is, whether one of two plaintiffs in an action of *assumpsit* brought by them as indorsees of a promissory note, after having assigned upon the trial of the cause all his interest and right therein to the other, who had paid into court all the costs of the suit, can be examined as a witness for the plaintiff to whom he has assigned.

*The rule of law which excluded a party to the suit upon the record from being a witness on the trial of it, although [*409] but a mere naked trustee without any real interest, never, I think, prevailed in courts of equity. *Goss v. Tracy*, 1 P. Wms. 290; *Croft v. Pyke*, 3 P. Wms. 180; *Man v. Wood*, 2 Atk. 229; *Mabank v. Metcalf*, 3 Atk. 95, 6; *Featherby v. Pate*, Ib. 604.

In Pennsylvania, however, where we have no courts of equity, and where for this reason our courts of law in making their decisions have been governed not merely by the stern and inflexible rules of law, but by those of equity and law combined, it has been decided that a trustee having no interest in the cause, although a party to it on the record, may be a witness. *Drum v. Less. of Simpson*, 6 Binn. 481.

The circumstance of the person offered as a witness being a party to the suit on the record is *prima facie* evidence of his having an interest in it; and it is for that reason, and that alone, that in this state he cannot be received as a witness, and not upon a mere principle of policy, because he is a party on record to the suit. If then it be shown, as no doubt it may in many cases when the fact is so, the evidence of interest not being conclusive but presumptive only, that he has no interest in the cause or the result of it, it would seem to follow as a natural consequence that he may be a competent witness. That he once had an interest is not material, although it may have continued down to the time of the trial, for his competency depends upon the fact of his being interested or not interested in the suit or the event of it, at the time that he is offered as a witness. If free from all interest whatsoever he is competent. This is proved by every day's experience and practice in courts. A person for example not a party on the record of the suit, but interested in it is offered as a witness to support that side of the issue which goes to sustain his own interest and is therefore objected to by the opposite party; and he is made an admissible witness in the presence of the court after the objection taken, by the execution and delivery or tender of a release; for the tender of such an instrument is sufficient when the party for whose benefit it is made refuses to accept of it. *Fowler v. Welford*, 1 Doug. 139. Since then the competency is made to depend upon the witness's being entirely free from interest at the time of his giving evi-

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dence, it can make no possible difference that he is a party upon the record.

Upon this principle it was that in *Patton's admrs. v. Ash*, 7 Serg. & Rawle, 116, James Ash, one of the plaintiffs on record, and one of the administrators of Patton, was admitted as a witness on behalf of the plaintiffs after executing at the time of trial before his examination a release to the heirs, of all claim to compensation for his services, and having paid into the hands of the prothonotary a sum of money sufficient to pay all the costs, and to be so applied let the suit terminate as it might. See also the cases of *Kerns v. Soxman*, 16 Serg. & Rawle, 315, and *M'Iroy v. M'Iroy*, 1 Rawle, 433-4, and the cases there cited, where in [*410] the first case a devisee in a will was held to be *a competent witness to prove it, after having assigned all her interest under it. And in the second case a legatee was in like manner adjudged to be a good witness to prove the will, after having assigned his interest for a money consideration, which was not then paid, but a bond given for the payment of it. It was also further decided, that the witness was competent whether he had parted with his property in the thing before or after suit brought to recover it; that the question was, did the witness then stand clear of interest in the cause? If he did, he was competent. See also the case of *Cox v. Norton*, 1 Penn. Rep. 412.

In the case of *Lowry v. Davis and Hanson*, decided by this court at its last session in Pittsburgh, which was almost in every respect like the present, it was held that Davis, one of the plaintiffs on the record in the court below, after making an assignment of all his interest in the suit to the other plaintiff, who paid all the costs into court, all of which was done after the jury were sworn, in open court, was a competent witness for the plaintiffs in the court below, to prove that Lowry, the defendant in that court, before the commencement of the action, had accepted and promised payment of the draft to the plaintiffs, to recover the amount of which draft the suit was brought.

The learned judge in the court below before whom this cause was tried, seems to have been opposed to the admission of the witness upon the ground of policy, as operating a surprise upon the adverse party, and opening a door to perjury. As to the principle of policy, apart from interest, I consider it as excluded from our consideration by a force of authority in this state that cannot now be resisted or overturned. But he seems in rejecting the witness to have relied mainly upon the authority of an expression used by the late Chief Justice in delivering his opinion in this court in the case of *Steele v. The Phoenix Ins. Co.*, 3 Binn. 314, who says, "where he (the plaintiff) assigns a

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particular thing to an individual (especially pending the action) and then comes forward to make out the case by his own testimony, he should be watched narrowly. In all such cases the court admit or reject the testimony according to their conviction of the assignment being a *bona fide* transaction or not." After reciting this expression of the late Chief Justice, he concludes by saying, "I am not convinced that this transaction is *bona fide*, but believe it to be colourable, and that the recovery, if it takes place, will enure to the benefit of both the plaintiffs. Exercising therefore the right I possess according to the opinion of the Supreme Court, I reject Thomas Hart as a witness in this case."

The expression of the late Chief Justice must receive a reasonable construction, and such as will comport with the principles which in practice have been applied to settle the question in other cases, where witnesses have been objected to on account of interest. For instance, if a person, not a party on the record, be called as a witness and objected to by the adverse party on the score of interest, *the party making the objection, must show the existence of the interest, and if it [*411] should clearly appear to be so from the testimony adduced for the purpose of proving it, the court will decide upon it and reject the witness: but if it be in the least degree doubtful the court will not decide the question of interest in the witness, but receive his testimony and leave it to the jury to determine whether he has an interest or not in the suit or the event of it, and if they should be of opinion that he has such an interest, then instruct them to pay no regard whatever to his testimony, and to leave it altogether out of view. So if on the trial of a cause, a deed or other instrument in writing is offered to be given in evidence, the execution of which is not admitted by the pleading or the adverse party, it must be proved before it can be read in evidence to the jury. If no evidence whatever tending to prove the execution of it be offered, the court will decide that it never was executed, and not permit it to be read to the jury; but if any evidence to this effect be given, however slight, the court have no right to decide then, upon the fact of the execution of the instrument, but must permit it to be read in evidence to the jury, and leave it to them to say whether or not it was executed.

This principle, to which the Chief Justice had reference in the expression already noticed, is set forth more fully, as well as with more precision, by Justice Yeates in the latter part of his opinion delivered in the same case, pages 316-17, where he says "there can be no doubt that where a voluntary assignment was made to appear clearly to the court to be collusive, they would interpose and reject the witness; and where there oc-

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curred any difficulty as to the fact, they would instruct the jury to pay no regard to the testimony of the witness, if they were satisfied that the assignment was merely colourable with an intention to defraud creditors." Here Justice Yeates lays it down in so many words, that unless the assignment appears clearly to be collusive, the court is not to decide, but to refer it to the jury. It must appear clearly; from what must it clearly appear to be collusive to the court? Most certainly from the testimony, but if there be no testimony showing it to be so, as in the present case, and the court below is to be at liberty to say that they are not satisfied but what there is still some collusion and unfairness in the transaction, and therefore they will reject the witness, it would be deciding the facts and the law both combined, and putting their decision beyond the revision and control of this court. It would, in short, be a direct violation of that rule which is the great distinguishing feature of the common law, *Ad questionem juris respondent iudices, ad questionem facti respondent juratores*. Hence I take it that all questions of fact which grow out of the trial of a cause by a jury, and appertain to its merits, in respect to which there is any testimony given, but not showing clearly how the facts are, or if the testimony be in the slightest degree contradictory, they must be referred to the jury to be decided by them. Under this view of the law, I think the court below erred in rejecting the party offered as a witness. The fact of his being *one of the

[*412] plaintiffs in the suit, and entered on the record as such, was clear evidence of his being interested until he executed the assignment and the costs of the suit were paid; but as soon as that was done, and that being all done in the presence of the court too, it was quite as clear in the absence of all other testimony, that he was completely divested of all that interest which he before had as a plaintiff in the cause. The execution of the assignment could admit of no doubt, because it was done in the presence of the court. The effect of it in law was equally certain. The witness thereby parted with all his interest, and the other plaintiff acquired the united interest of both, and by the payment of the costs of the suit, he was discharged from all liability for them; and in contemplation of law, stood entirely disinterested. It is only the legal responsibility or claim of a person that is to be regarded in deciding upon his competency as a witness. That which arises barely from a sense of honour, or conscientious feeling, without any legal obligation being connected with it, or to support it, or when such did exist, but has been removed, is insufficient to prevent a person from being a witness. By the assignment which was made in the present case, the party offered as a witness, ceased to have any claim in

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the suit which he could either support in law or equity ; and by payment of the costs of the action, which was also done, he was discharged from all liability in law or equity which could possibly affect his interest, and ought therefore to have been admitted as a witness. The judgment of the court below is reversed, and a *venire de novo* awarded.

Cited by Counsel, 2 Wh. 154 ; 5 Wh. 447 ; 5 W. 497 ; 6 Barr, 84 ; 1 J. 222 ; 7 H. 322 ; 1 G. 335 ; 1 Wright, 249 ; 2 S. 309 ; 7 S. 246.

Cited by the Court, 4 H. 230 ; 2 C. 62.

END OF DECEMBER TERM, 1831.—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1832.

[PHILADELPHIA, MARCH 30, 1832.]

Maris *against* Parry and Others.

APPEAL.

If the recognitors who are sworn in an assize of nuisance cannot agree and are discharged, the panel cannot afterwards be resummoned, and the whole of them sworn, to afforce the assize.

Nor can those who were not previously sworn, be sworn with a tales and take the assize.

Nor can a writ be awarded commanding the sheriff to summon a new set of recognitors.

THIS was an assize of nuisance originally commenced in the Court of Common Pleas of *Bucks* county, by William Maris against Benjamin Parry and others, and removed by *certiorari* to the circuit court.

At a circuit court held at Doylestown, by the late Judge Smith, on the 22d of February, 1830, all the twenty-four recognitors summoned by the sheriff appeared except two, who made default; but the cause was continued in consequence of the absence of a material witness for the defendants. A circuit court was held by the Chief Justice on the 7th of March, 1831, when twenty-three of the recognitors appeared, one of them having died in the interval. Twelve of them were on the following day called, who having severally answered that they had viewed the

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place in dispute between the parties, were severally sworn or affirmed, well and truly to try this matter of assize between the parties, according to their evidence, and charged to inquire, "whether the defendants, unjustly and without *judgment, had erected, levied, and raised, a certain wall [*414] and dam, thereby obstructing a certain mill-site, and a certain water course in the township of Solebury, in the county of Bucks, to the nuisance of the freehold of the said William Maris, situated in the same township and county within thirty years last past, and if they did, then to inquire what costs and damages the plaintiff had sustained by reason of such erecting, levying, and raising the said wall and dam, thereby obstructing the mill-site and water course aforesaid, and if they did not erect, levy, and raise the said wall and dam and thereby obstruct the mill-site and water course aforesaid, then to say so and no more; and so that they should stand together and hear their evidence." On the 11th of March, the recognitors who had been empannelled, came into court and said they had not agreed upon their verdict and could not agree; upon which they were permitted to separate; and on motion of the counsel for the plaintiff, the court awarded a writ of resummons, returnable to the next circuit court.

The next circuit court was held by Judge Rogers, on the 27th of February, 1832, when all the recognitors appeared, and being called, severally answered, that they had viewed the premises, all of them once before the last circuit court, except Abraham Garges, and all of them, except William H. Rowland, Robert Armstrong, and Hugh D. Ferguson, also since the last circuit court. The plaintiff by his counsel prayed that the recognitors, to the number of twenty-three there present, might be sworn, in order that the assize, which had been ordered to be taken, might be afforded, to which the defendant's counsel objected, and the court refused to permit them to be sworn. The plaintiff then prayed that the eleven recognitors who had not been sworn at the former circuit court, might be called and sworn with a tales, and the assize taken by them, which was also refused by the court. The plaintiff then prayed that a writ might be issued to the sheriff commanding him to summon other recognitors to view, &c., and take the assize in this case, returnable at such time as the court should direct, which was also refused. The recognitors were therefore discharged by the court against the consent of the plaintiff, who appealed to the Supreme Court for the following reasons, viz.:

First. That his Honour erred in refusing to permit the recognitors to the number of twenty-three to be sworn, &c., to afford the assize.

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Second. That his Honour erred in refusing to permit the remaining eleven recognitors who had not theretofore been sworn, to be sworn with a tales, and take the assize; and in deciding that none of the present recognitors could pass on the case.

Third. That his Honour erred in refusing to award a writ to the sheriff, to summon a new set of recognitors.

Fourth. That his Honour erred in discharging the recognitors.

J. M. Porter and *J. R. Ingersoll*, for the appellants.—The only question raised upon this appeal is, what is the proper course of proceeding, where twelve recognitors in an assize of nuisance are sworn and cannot agree upon their verdict. The [*415] long disuse of this remedy *in England renders it impracticable to produce a precedent applicable to the present inquiry. It does not however follow that the remedy is to fail for that reason. The case of *Barnett v. Ihrie*, 17 Serg. & Rawle, 174, has recognised the assize of nuisance as an existing remedy in Pennsylvania, and it was there said, that when modified by the improvements of which it is susceptible, and adapted to modern times, it is a proper and salutary means of enforcing the laws of the commonwealth. It remains unaltered in all its essential properties, but times and circumstances having changed, it is in matters of form to be made to accord with modern practice. Instead therefore of crippling it by giving effect to technical difficulties, the court will be disposed to aid its operations, in order to render it extensively useful. Where a defendant is insolvent and contumacious, it is the only effectual remedy for the injury complained of. Verdict after verdict may be obtained without any beneficial result. In such an event, Blackstone says, (3 Bl. Com. 222,) recourse must be had to the old and sure remedies, which will effectually conquer the defendant's perverseness by sending the sheriff with his *posse comitatus* to level the nuisance. If therefore this remedy be out of use in England, it is not because it is considered an improper or useless one, but because occasion does not call for it. In Pennsylvania, the necessity of resorting to it frequently arises, and therefore every facility should be given to its proceedings. In this case twelve of the recognitors were sworn, and heard the evidence, but could not agree upon a verdict. They were accordingly discharged and a writ of resummons issued. What then was to be done? Perhaps, according to ancient practice, application should have been made *instantly* to afforce the assize. But the Chief Justice had dispensed with the application, and the defendants had made no objection to the discharge of the recognitors and the issuing of a writ of resummons. Immediate afforcement was therefore impracticable.

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Another reason prevented it. When the trial came on, it was supposed it would continue a week. The attending jurors were therefore dismissed, and the recognitors considering themselves as ordinary jurors, departed with the rest. It thus became necessary to pursue the course which was adopted, or the remedy would have failed altogether. This course is obnoxious to no reasonable or legal objection. The office of the additional recognitors, is analogous to that of supernumeraries on a court-martial. When they have been present during the investigation, have heard the evidence and the arguments, there is no difficulty in their joining in the verdict. The remedy being at hand, may be resorted to *instantly*. But in the present instance, a concurrence of circumstances, brought about by a want of familiarity with the details of the proceedings, rendered that course impracticable, and the question is, whether no other was open. Immediate enforcement, having thus become impossible, all that remained to be done, in order to prevent what had been done from becoming nugatory, was to issue a resummons, and to this, the mere separation of the recognitors was no substantial objection. Every similar tribunal may adjourn and separate. This is the every day practice of land- [*416] lord and tenant's juries, and sheriff's juries. Recognitors of assize, are not, as was said in *Barnett v. Ihrie*, like ordinary jurors, nor are they governed by the rules which regulate them. The proceeding by assize, is in the nature of an inquest to try the whole matter, and it is no more terminated by such an event as occurred in this case, than if the judge had been indisposed, and obliged to adjourn the trial. The recognitors originally summoned must try the cause. Having had the view, they alone can take the assize, and if they have been discharged they must be resummoned. As long as the writ remains, the recognitors may separate and reassemble. The objections which may be raised to the separation of jurors, do not apply to recognitors of assize. A majority of the recognitors is sufficient for a verdict, but with jurors unanimity is required. To tamper therefore with eleven of the former is not so dangerous as with one of the latter. For this reason they are not surrounded with so many safe-guards to protect them from the contamination of the parties. They, in fact, are always with the parties. They go with them to view the premises and hear their statements, in the absence both of court and counsel. It can only be argued that separation vitiates the whole proceeding by a supposed analogy to juries, which clearly does not exist. But with us, even in the case of a jury trial, separation has not such an effect. If one of the jurors becomes unwell, the trial may be adjourned to a future day and the jury separate; such things frequently occur in our

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courts. Again, recognitors receive no charge from the court, which distinguishes them also from jurors, and renders it less improper for them to separate. In proceeding by assize, adjournments frequently take place, as the books show, and there is nothing in the circumstances of this case to prohibit an adjournment. In England the recognitors, or so many of them as can be found, may be called together again, by a certificate, and if there is anything in the nature or form of that writ, which prevents its use with us, the court will take care to provide a substitute to give the party a rehearing, when injustice has been done. A writ of resummons to the original recognitors, is obviously the most convenient course of proceeding in such a case, and the most analogous to the ancient forms. But if this cannot be done, a writ to summon new recognitors would be less inconvenient and expensive than to let the whole proceeding fall to the ground and begin again. Besides, as the assize does not fall, but is still pending, if the plaintiff should resort to another, the defendants may plead the pendency of the first, and thus defeat him. It may be truly said, that from the little light that can at this distance of time be obtained, the whole subject is obscure; but as this court has declared the assize of nuisance to be not only an existing but a useful remedy, and it is completely under their control, it is to be presumed they will mould it in such a manner, as to give it the fullest and best effect. They cited Reeve's Hist. Eng. Law, 330, 331, 334, 335; [*417] 1 Mod. 123; *Fleta. 230, 339; Bract. 184, 185; Booth on Real Actions, 215, 279, 283, 289, 291, 294; Fitz. N. B. 447; 2 Inst. 26, 410, 414, 415; 4 Co. 4; 10 Co. 104; 3 Vin. Ab. 190, 191; Br. Ab. 97, 193, 194; Trials per Pais, 270, 271; Co. Litt. 155; Livezey v. Gorgas, 1 Binn. 252.

Kittera, for the appellees. The plaintiff has thought proper to select an unusual and antiquated remedy, with few lights to guide his path, and if he has found it beset with difficulties and has at length arrived at a point beyond which he cannot go, it is no more than he might have anticipated. This *festinum remedium* commenced in the year 1828, in the Court of Common Pleas, which sits four times a year. It was afterwards removed to the Circuit Court which sits once a year, and after the lapse of four years, the parties find themselves exactly where they were when they set out. If the ordinary remedy had been resorted to, the plaintiff might long since have had a conditional verdict, if he was entitled to it, by which full justice would have been done. But he turned aside from the usual course, to pursue one, which he confesses, he knows nothing about, and he now asks the court to devise some method, to relieve him from the

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difficulties he has brought upon himself. Fleta, was compiled from Glanville and Bracton, and subsequent writers have derived their learning on this subject from Fleta. More is to be found in Reeves than in any other author. He has collected all that is valuable on the subject. But neither in Reeves nor in any other book can an instance be found, in which, when the assize has been dismissed, the proceeding has not been considered at an end. And it is right that it should be so. In case the assize be afforced and the verdict ultimately rendered for the plaintiff, the consequences to the defendant and the dissenting jurors, are penal. They are liable to an attain. If the plaintiff cannot get twelve men to say that the defendant has been guilty of a disseisin, he should be allowed to depart. This is the course in all our proceedings of a similar nature. There is no instance in which a jury who have refused to give a verdict and been suffered to separate, have been again put into the box. The ancient mode of proceeding under such circumstances was to afforce the assize immediately. It was done while the matter was fresh in the minds of the recognitors, and before they had an opportunity of conversing with any one. No one was permitted to speak to them, except the judge, to ascertain how they stood. Bracton says, "you shall get a verdict, if you can; if not, you must go to the great court." The court could resummon the recognitors but in a single instance, when a certificate of assize was granted. This was done when it became necessary to take the opinion of the court upon a deed or some such matter. But to resummon the recognitors after they have refused to give a verdict and been discharged, was never before heard of. The recognitors, if not turned into a jury by the parties, are witnesses in the cause and liable to an attain for false testimony. If *they are not able to testify as to the whole, they [*418] must, if they can, as to part. When they say they cannot testify, there is no instance of their being kept together until they can. The great object of proceeding by assize is dispatch. Everything like delay is discountenanced; but the delays incident to the course of proceeding now proposed, are interminable. Twelve recognitors are sworn, who after hearing the whole case, cannot agree, and are discharged. An application is made to the court to have them resummoned, and after the lapse of a year the court is asked to have them afforced. No authority for such a proceeding can be found, and it is contrary to the whole spirit of the proceeding by assize. The moment the recognitors were permitted to separate, the whole proceeding was at an end. There was no mode of reassembling them. The plaintiff could not have a certificate, as that always contains the finding and here was no finding. The court has never been

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called on to afforce the assize properly, from the beginning to the end of this proceeding. When the assize is afforced, it is never by swearing all the recognitors summoned, as was proposed to be done in this case, but by adding others to the major part of the assize according to the number of dissenting voices. This was never asked for. The other proposal, to swear the eleven who had not already been sworn and add others to them, is not recommended by anything to be found in any book. The plaintiff's counsel admit, that to summon new recognitors is incorrect, when they argue that the assize is a peculiar tribunal, which must carry the whole proceeding through without being changed. Nor can the court summon a new set of recognitors. It has no such power. One of two courses is alone open. They must either bring back the twelve who have already heard the case and add others out of the original set, until the assize is enforced, which properly can only be done *instanter*, or they must direct the proceeding entirely *de novo*, and then after an equally long time has been consumed, the same scene may be re-enacted. This court has indeed said, that the assize of nuisance is an existing remedy in Pennsylvania, but it has not said, that what relates to afforcing the assize is the law here. It has not been done in England for half a century or more, and policy forbids its introduction among us. To press out of twenty-four men, a verdict of twelve, is what is done in no other case and is not justifiable in this. The party must make out his case to the satisfaction of twelve men, and if he cannot do it, and the recognitors are discharged, it is an acquittal of the defendant, for others cannot be summoned. The effect of failing in this case is the same as in a variety of other cases. If a party fails in a proceeding before a landlord and tenant's jury, no one ever heard of the jury being resummoned. The inconvenience of the course proposed would be extreme, and it is at variance with all our ideas of propriety. This tribunal, which was intended to give a speedy remedy may be kept in operation ten years and converted into an instrument of oppression in the hands of a powerful man. It would be better to abandon it altogether.

[*419] *To understand this intricate, antiquated, and obscure branch of the law, would require the study of years, and perhaps the result would be to prove that it was not understood even in those times in which it was most frequently brought into operation. He cited Reeve's Hist. Eng. Law, 130, 132, 190, 328, 350, 376; 3 Reeves, 23; Savier v. Lenthall, 1 Salk. 82; 3 Vin. Ab. 191; Jac. Law Dict. tit. Assize.

The opinion of the court was delivered by

HUSTON, J.—In this case I shall content myself with giving

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the decision of the court as I understand it, without pretending to explain the assize of nuisance, or direct the mode of proceeding in it.

In *Barnett v. Ihrie*, 17 Serg. & Rawle, 212, it is said, "The recognitors are not jurors; they are not summoned for a single term, but to attend the cause from its inception to its termination; and this they must necessarily do as they are to have a view before the return of the writ."—Agreeably to this, which is also the doctrine of *Livezey v. Gorgas*, 1 Binn. 252, no new recognitors can be brought in; the only process to summon them is the original writ which summons the defendant. The majority of the court are of opinion that the assize cannot be afforded by adding other jurors in any case, much less can it be done by suffering those who were sworn and could not agree, to separate for a year, and then collect them and add others till twelve could be found of one opinion.

The cases which speak of collecting the recognitors or so many of them as can be found, are not cases in which they were sworn and could not agree, but cases of a certificate, which was a new writ commanding a second examination of a case decided on, or a writ of *redisseisin*, &c., &c.

It has been compared to a writ of inquiry of damages, or of condemnation of lands levied on by a *fieri facias*; it is in all respects different from both. They are proceedings in a suit in which judgment has been obtained; this is a proceeding, instituting a complaint, bringing in the party, and asking a trial and judgment.

It more resembles our proceeding by landlords to recover possession against tenants holding over. The justices and juries in such cases, do sometimes adjourn during the progress of the proceedings; but if it is contended that after the jury have heard all the evidence offered, have retired to make their inquest, and have returned to the justices that they cannot agree, and for that reason are permitted to separate, and do separate and go home for weeks, months, or a year, they can be called together on the old process, and the matter again submitted to them, and be decided by them, I utterly deny it. There has been no such usage, though there may have been a single such case. Such a practice has never received the sanction of any court; it is against all principle, and shocks the common sense of right and justice. Nor can the sheriff in such a proceeding summon another jury, that first summoned is part of the machinery without which the rest *cannot move. So have this court before decided in the assize of nuisance. The decision [*420] of the court, in not permitting the plaintiff to proceed with his case, is right.

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Let it not be understood that we suppose the Chief Justice erred in permitting the jury who could not agree, to separate. That part of the common law which once said a jury could be starved until they agreed, or until one died, and thus a verdict became impossible, is too old for use; it could not be safely put in use by a judge now, he might become entangled in the machinery.

If a party will resort to a mode of proceeding, subject to certain inconveniences, he must take the consequences, even if that should be that he end where he began.

Cited by Counsel, 12 H. 98.

Explained in 4 W. & S. 125.

[PHILADELPHIA, MARCH 30, 1832.]

Case of Peter Rhoads' Estate.

APPEAL.

The regular confirmation by the Orphans' Court of an administration account, showing a deficiency of personal assets for the payment of the debts of the decedent, is a final settlement, within the meaning of the act of 1st of April, 1811; and authorizes the Orphans' Court to make an order for the sale of the real estate of the decedent, for the payment of his debts.

If the question, whether or not a partition has been made, is presented to the Orphans' Court, as an incident to the principal subject before them, they must decide it; or they may, if they think proper, direct an issue to determine it.

When lands devised to several, as tenants in common fee, have been appraised in separate lots by persons chosen by the parties, and the devisees enter into a written agreement, declaring that they have made a full and just partition thereof, according to the appraisement and allotment, and enter into and hold possession of the same, this is a valid and binding partition, notwithstanding the agreement contain a stipulation that the parties shall contribute equally to the payment of an existing claim upon a part of the estate, and a covenant that they shall before a certain day execute a deed of partition, or such other legal assurance, as may be deemed necessary.

An agreement by a *feme covert* making partition of her real estate, is binding, without a separate examination and acknowledgment; particularly if it be to her advantage, and not objected to by her, or those claiming under her.

If the devisees of lands as tenants in common, make partition by agreement, and the portion of one of them be sold by order of the Orphans' Court for the payment of the debts of the testator, that court has power by virtue of the act of 1st April, 1811, to decree contribution by the other devisees.

THIS case came before the court on an appeal from the decision of Huston, J., at a Circuit Court held in *Lehigh* county, in April, 1831, *reversing the decree of the Orphans' Court of [421] that county, relative to the estate of Peter Rhoads, deceased. The case was as follows: Peter Rhoads being seized of

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several tracts of land and other real estate, situate in Lehigh county, by his will devised the residue of his estate to his children, George, Peter, John, and Catherine, share and share alike, as tenants in common in fee. The testator died, about the 18th of December, 1814, and on the 15th of April, 1815, Peter, George, and John Rhoads, and Jacob Blumer, and Catherine his wife, (late Catherine Rhoads,) by an agreement under their hands and seals, made a "full and just partition between them, of all the messuages, lands, tenements, and hereditaments which they theretofore held as tenants in common, by virtue of the last will and testament of their father the said Peter Rhoads, the elder, deceased, lying in the county of Lehigh, and in manner following, to wit—

To George Rhoads was allotted :

"1. A messuage, farm and tract of land, marked in the draft of South Whitehall tract No. 2, containing a hundred and forty-one acres, and a hundred and thirty perches, late in the possession of George Adam Newhard.

"2. A tract of woodland in Salisbury township, bounded by lands of James Greenleaf, Rudolph Smith, and others, containing twelve acres and a hundred and fifty-four perches.

"3. Another tract of woodland in said township of Salisbury, marked in the draft of division of the Lehigh Hill tract No. 2, containing eight acres and a hundred and forty-four perches, with their appurtenances.

"All of which the said George Rhoads accepted at and for the sum of eleven thousand and sixteen dollars and twelve cents."

To Peter Rhoads (the younger) was allotted :

"1. The stone messuage, barn, and two lots of ground in Allen street, in the town of Northampton (then in his possession) containing together in front a hundred and twenty feet, and in depth two hundred and thirty feet.

"All that tract of land, marked in the draft of division of South Whitehall tract No. 3, containing a hundred and thirty acres and ninety-two perches.

"3. A tract of woodland, situate in South Whitehall township aforesaid, bounded by lands of Adam Dorney, Jacob Shantz, and others, containing five acres and a hundred and two perches.

"4. Another tract of woodland in Salisbury township aforesaid, marked in the said draft of division of the Lehigh Hill tract No. 3, containing seven acres and fifty-three perches, with the appurtenances.

"All of which the said Peter Rhoads, the younger, ac-

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cepted at and for the sum of thirteen thousand five hundred dollars."

To John Rhoads was allotted :

"The messuage, farm, and tract of land (then in his possession) *marked in the said draft of division of the South [*422] Whitehall tract No. 1, containing two hundred and ten acres with the appurtenances.

"Which the said John Rhoads accepted at and for the sum of sixteen thousand eight hundred dollars."

To said Catherine Blumer, her heirs and assigns, was allotted :

"1. All that tract of land, marked in the said draft of division of the South Whitehall tract No. 4, containing a hundred and fifty-seven acres and a hundred and fifty-two perches.

"2. A lot of woodland in South Whitehall township, aforesaid, bounded by lands of Daniel Good, Henry Blumer, and J. Leonard Steininger and others, containing three acres and thirty-three perches.

"3. Another tract of woodland in Salisbury township, aforesaid, marked in the said draft of division of the Lehigh Hill tract No. 1, containing nine acres and a hundred and thirty perches with appurtenances.

"All of which the said Jacob Blumer and Catherine his wife, accepted at and for the sum of ten thousand seven hundred dollars."

By this agreement which was not acknowledged, the parties agreed to contribute equally towards paying and satisfying all claims which the heirs of James Allen, deceased, might have to a portion of the estate forming part of the allotment of Peter Rhoads, and covenanted, that they would, on or before the first day of the following August, execute a deed of partition, or such other legal conveyance as might be deemed necessary "for the well and sufficient granting, conveying, assuring, and confirming unto each of the said parties, their heirs and assigns in severalty forever, the several portions above allotted to them respectively, according to the true intent and meaning of the agreement."

The parties to the partition held the portions respectively allotted to them, in severalty from the date of the agreement, and continued to hold the same, except a certain part, which was sold for the payment of the debts of the testator as will be mentioned hereafter.

Catherine Blumer died about the 31st of December, 1817, leaving issue by her said husband, who survived her, six children.

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Peter and George Rhoads were the executors of their father's will. George, on the 29th of March, 1819, renounced the executorship, and on the 4th February, 1820, was, at his own request, dismissed by the court.

The debts of the testator, at the time of his death, and at the date of the agreement of partition between his devisees, did not exceed six thousand dollars. Peter Rhoads the acting executor settled an account of his administration, on the 10th of May, 1819, from which it appeared there was a deficiency of personal assets for the payment of debts, to the amount of four thousand nine hundred and thirty dollars and eighteen cents, besides interest. He therefore applied to the Orphans' Court, for an order to make sale of the real estate of the testator for the payment of his debts, which was granted *on the 4th of February, [*423] 1820. On the 5th of May, 1820, he reported that in pursuance of the said order he had made sale of part of the said lands, to wit :—

“One tract situate in South Whitehall township, bounded by lands of John Frey, Abraham Greisser, late Casper Schenck-bruck, Frederick Swander, and other lands of said deceased, containing one hundred and forty-one acres, one hundred and thirty perches, strict measure, being part No. 1, of the portion allotted to said George Rhoads in the partition aforesaid, also,

“One lot of woodland situate in the township aforesaid, bounded by lands of Adam Dorney, John Leonard Steininger, Jacob Schantz, and Christian Steininger, containing five acres, one hundred and four perches, strict measure, being part No. 3, of portion allotted to said Peter Rhoads the younger, in the partition aforesaid, for the sum of three thousand dollars, two thousand dollars in hand, and the rest or remainder in five yearly payments, from the first day of April, 1821.”

Peter Rhoads the executor, settled an account with the estate of his testator, on the 1st of September, 1824, exhibiting a balance in his favour of four thousand and twenty-seven dollars and three cents. This amount was presented to the Orphans' Court and confirmed *nisi*, on the 3d of December, 1824.

In the meantime, namely, on the 30th of August, 1824, George Rhoads obtained from the Court of Common Pleas of Lehigh county, a discharge as an insolvent debtor, and on the same day executed an assignment to trustees of all his property, real, personal, and mixed, to which he was in any manner entitled.

On the 11th of September, 1828, the trustees of George Rhoads presented a petition to the Orphans' Court of Lehigh county, reciting the devises in the will of Peter Rhoads the elder; the partition of his estate among his devisees; the sale by Peter, the acting executor, of part of the shares allotted to

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George and Peter for the payment of the debts of the testator, and praying the court to award a citation to Peter Rhoads, John Rhoads, Jacob Blumer, and the heirs of his late wife Catharine, (naming them all,) to appear at such time and place as the court should appoint, "and show cause why the court should not decree what contribution should be made by the aforesaid devisees, their heirs and assigns respectively, towards the payment of the debts chargeable on the real estate of said testator, and particularly what contribution should be made by the said Jacob Blumer and the children of the said Catharine Blumer, late Catharine Rhoads, deceased, and the said John Rhoads and Peter Rhoads, (the younger,) towards payment of the debts of said testator, and for which said tract of one hundred and forty-one acres and one hundred and thirty perches (part of the portion allotted in said partition to said George Rhoads) was sold by said Peter Rhoads (the younger) as executor aforesaid."

Upon this petition a citation issued according to its prayer, returnable at the next stated Orphans' Court, on the 13th of December, 1828, when the court appointed auditors "to ascertain the amount of *debts yet due by the estate of said [*424] deceased, and the amount of the contribution to be made by the several devisees, towards the payment thereof, including also the debts for which part of the real property of said deceased, has been hitherto sold by his executors, by virtue of an order or orders of sale granted to him by the court."

After several renewals of the order and the substitution of other auditors in the place of those first appointed, a report was made on the 15th of May, 1830, by a majority of the auditors last appointed, as follows :

"That an agreement was entered into by the heirs and devisees of the said Peter Rhoads, deceased, bearing date the 16th day of April, A. D. 1816, under the hands and seals of Peter Rhoads, Junior, George Rhoads, John Rhoads, Jacob Blumer, and Catharine his wife, by which said agreement they divided the lands of the said Peter Rhoads, deceased, the same having been valued and appraised, in the following manner, that is to say :

The part accepted by George Rhoads, valued at . .	\$11,016 12
do. Peter Rhoads,	13,500 00
do. John Rhoads,	16,800 00
do. J. Blumer & wife,	10,700 00
	<hr/>
	\$52,016 12

"The debts owed by the Estate of said deceased, as far as we could ascertain the same (Peter Rhoads, the executor, not having

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furnished us with any information, more than what we could obtain from the account filed in the office) are by our estimate of the sum of six thousand dollars.

Amount of the Estate, as per appraisement, deducting debts, balance,	\$46,016 12
The said balance of forty-six thousand and sixteen dollars and twelve cents, divided between the heirs, each share	\$11,504 03
From the share deduct George Rhoads' valuation	11,016 12
<hr/>	
Balance due George Rhoads on the 16th of April, 1816,	\$487 91
By the same method of calculation Peter Rhoads owes	\$1,995 97
John Rhoads owes	5,295 97
Jacob Blumer in right of his wife, has to receive	804 03

"It appears that the parties above named, went into possession of their respective shares, and are in possession yet, except such a part which has been since sold to pay the debts, to wit: the land accepted by George Rhoads, sold May 15th, A. D. 1820, by an order of the Orphans' Court, to pay the debts of the deceased, &c.

"If the court should be of the opinion, that the agreement and partitions are binding on the parties, then Jno. Rhoads has to contribute to George Rhoads for the sale of his land, two thousand eight hundred *and eighty dollars and sixteen [*425] cents, with interest on the same, from the 5th day of May, 1820, to the 7th of May, A. D. 1830—amounting to four thousand six hundred and eight dollars and eleven cents—if the court should be of opinion, that interest should be charged on the several sums due by John Rhoads and Peter Rhoads on the valuation aforesaid, and on the sums due on said valuation to George Rhoads and Jacob Blumer or his heirs.

"If the court should be of the opinion, that no interest is to be charged on their several sums, then George Rhoads has to receive in contribution the sum of two thousand eight hundred and eighty dollars sixty-six cents, without prejudice to his right to the sum of four hundred and eighty-seven dollars ninety-one cents, due him in the valuation aforesaid.

"But if the court should be of the opinion, that the partition and valuation made by the said parties, is not binding, and that the agreement so entered into is not binding, then we find no contribution is to be made to George Rhoads; but, that each

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pay rent for the part of the estate each held or was charged with in the following manner, to wit :

John Rhoads, for the first ten years, at the rate of one hundred dollars per year, amounting to	\$1,000
For five years at one hundred and fifty per year,	750
	<hr/>
	\$1,750
Peter Rhoads, fifteen years at one hundred and fifty per year,	2,250
Jacob Blumer or his heirs, at twenty-five per year,	225
George Rhoads, for the time he held his land in possession,	375
	<hr/>
Total,	\$4,600

"All of which we respectfully submit to the court for their further determination. Witness our hands, May 7th, 1830."

To this report, exceptions were filed on the 4th of September, 1830, and a rule was obtained to show cause why it should not be set aside. The court at the same time ordered "the agreement for the partition of the real estate of the said deceased among the devisees to be filed with the clerk of this court, and the matters relative to the contribution, held under advisement until next Wednesday morning at ten o'clock, and Peter Rhoads executor of said deceased, to furnish to the court by that day, under oath or affirmation, a detailed statement of the debts due by the said deceased, showing the principal and interest thereon accrued, and keep the principal and interest distinct from each other, or in default thereof, that the court would confirm the report of the auditors, and decree the partition of the real estate of the said Peter Rhoads deceased, to and amongst his devisees, [*426] as reported by the auditors, to be good and binding upon *said devisees; and would also decree the contribution reported by the said auditors, to be made according to their report."

Peter Rhoads, the executor, having neglected to furnish the required statement of the debts of the deceased, the court, on the 8th of September, 1830, dismissed the exceptions, discharged the rule, confirmed the report of the auditors, and decreed "the agreement and partition of the real estate of the said Peter Rhoads, deceased, to and amongst his devisees as reported by said auditors, to be good and binding upon said devisees;" and further decreed "the contributions reported by the said auditors, to be made according to their report, with

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interest from the 5th of May, 1820, when George Rhoads' land was sold."

From this decree of the Orphans' Court, Peter and John Rhoads entered an appeal to the Circuit Court, where the following opinion was given by

"Huston, J.—An agreement between tenants in common to divide the lands held by them in common, when reduced to writing, and signed and sealed by them, will generally be carried into effect by our courts, as though deeds of partition had been actually executed. But where something remains to be done by the parties, before the deeds are to be executed, and that something is not done, where in the meantime the situation of the parties is greatly changed, and the value of particular parts of the property greatly increased or diminished—where the death of some of the parties has rendered the execution of deeds impracticable, in short, where the change of circumstances in any respect has caused, that carrying that agreement into effect, would produce injustice between the parties, a court may, and in some cases ought, to refuse to carry it into effect. I give no opinion, however, on these matters, in this case, because I believe, there was a mistake in the Orphans' Court in considering this matter as within their cognizance and jurisdiction. I admit, that where the heirs of a deceased person are all of age, they, or one of them, may apply to the Orphans' Court to have partition made as though some of them were minors, but where they are all of age, and do not proceed in the Orphans' Court to obtain partition but by agreement and contract between themselves, the validity of such contracts is more proper for the decision of the Court of Common Pleas than an Orphans' Court, and its validity comes incidentally before an Orphans' Court, and is denied by some of the parties, perhaps the better way would be, either to direct an issue in the Common Pleas, to decide, whether there was or was not a partition made between the parties, or to stay the proceedings in the Orphans' Court, until one of the parties brought an adverse suit in the Common Pleas to decide this matter.

"The present case is involved in difficulty in whatever point of view you consider it. It must not be forgotten, that although Catharine Blumer signed this article of agreement with her husband, yet she never acknowledged that instrument in due form of law. It is *then, as though she had never executed it, and although if long acquiesced in, it might bind her [*427] heirs, yet in other circumstances they might not be bound; and if to consider it binding, would have the effect of depriving them of a full share, or any share, as may be the case, if the

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unpaid debts are levied on their parts, or if in any other respect, it would sweep from any one of them his interest in the intestate's estate, and leave others in affluence. It is questionable, whether this agreement ought to be considered at this length of time, binding between the parties, so questionable, depending upon so many facts and circumstances, as, that it ought not to be decided incidentally in any court, much less in one within whose jurisdiction it does not properly come. I repeat, that I do not mean to give an opinion, whether it is or is not binding on the parties, but merely to say, that there is in it enough of importance and enough of difficulty, to make it proper, that George Rhoads, or his assignees, should bring a writ of partition in the Common Pleas of this county, to obtain a partition of the lands of the intestate. If the other heirs do not oppose this, the lands sold for debts will be considered equally the loss of the heirs and the remaining lands will be divided equally among the heirs. If they, or any one of them does oppose it, the effect of the article of agreement will come directly before the court and jury, and a solemn decision will settle the matter, so that all parties will be forever bound, as well minors as others, for the court will take care, that guardians will be appointed to take care of their interests. If there will be difficulty in obtaining justice as to the rents and profits of the lands since the year 1816, that difficulty must be encountered, and perhaps justice may be obtained in proper form of action or actions, and even though the statute of limitations, or some other cause, may prevent complete justice as to these rents and profits—it is better that should be sustained, than the title to all the lands of the intestate should remain in doubt and uncertainty. I am therefore of the opinion that the decree of the Orphans' Court should be reversed."

The trustees of George Rhoads appealed from this decision to the Supreme Court, and filed their reasons for the appeal in writing, which it is unnecessary particularly to specify.

Davis and J. Sergeant, for the appellants.—This case presents a single question, which though of considerable magnitude, is very plain. It depends upon the true construction of the act of 1st April, 1811, *Purd. Dig.* 673. The appellants have sustained a manifest wrong, and if they do not find a remedy in the provisions of this act, they are entirely without one. The act provides, that the Orphans' Court shall have power in all cases where executors or administrators, after the final settlement of an account, apply for an order to make sale of the real estate of the testator or intestate for the payment of debts, to decree "what contribution shall be made by the heirs or

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devisees respectively, towards the payment of any debts chargeable on the real estate of any testator, either generally, in the first instance, or where the land decreed to be sold shall have been in any manner *devised to any heir or devisee [*428] after any such sale being made." The land devised to George Rhoads by the will of his father, was sold for the payment of his father's debts, and his trustees claim contribution from the other devisees. If the devises had been of specific pieces of land no doubt could have been raised as to the right to contribution, or as to the power of the Orphans' Court to enforce it. But the devisees held under the will as tenants in common, and here the difficulty has arisen. Their interests however were distinct. They held undivided moieties and their only unity was that of possession. 2 Bl. Com. 182, 191, 194. The partition however placed them in the same situation as if their respective portions had been specifically devised. Partition neither enlarges nor diminishes the estate of each tenant in common, but ascertains the particular part of each, which he did not know before, and gives it to him in severalty. The tenure however is no more changed by the partition, than by the adjustment of a boundary. The parties hold after it, by exactly the same title as that by which they held before it. The question then arises, whether a valid partition was made by the devisees of Peter Rhoads, and the whole evidence clearly proves that there was. The agreement by which it was made, designates each purpart with perfect accuracy and certainty, and the parties took and continued to hold possession of their respective allotments, in severalty, agreeably to the terms of the partition. Being compellable to make partition, they were competent to do it by agreement without process of law. It was not necessary that it should be by deed. It might have been done even without any written agreement, for even a parol partition between tenants in common made by marking a line of division on the ground, and followed by a corresponding separate possession, is good, notwithstanding the act for the prevention of frauds and perjuries. *Ebert v. Wood*, 1 Binn. 216. Nor was the circumstance that one of the parties, Catharine Blumer, was a married woman, any objection to its validity. If the partition had been unequal, perhaps it would have been voidable by her, though it was not void; but as it was equal, taking the money to which she was entitled, and the land together, it was binding on her and her heirs. *Co. Litt.* 170a, 171 a. It is true that at common law owelty of partition cannot be effected by money, but in Pennsylvania, the difference between the value of the shares admits of a pecuniary compensation. The separate examination of Catharine was not necessary. If

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she could not make partition by agreement, without a separate examination and acknowledgment, she could not do it at all; for she was to make no grant, and the act of assembly requiring the separate examination of a *feme covert*, refers only to grants. She could have been compelled to make partition, notwithstanding her coverture, and was therefore competent to do it voluntarily. She has done so, and neither she nor any one claiming under her, ever complained of the agreement or wished it annulled. An objection in her name comes with a bad grace from those whose success would operate to the disadvantage of her [429] minor children. But whether the heirs of Catharine were bound by the partition or not, Peter and John Rhoads clearly were. *Burke v. Lessee of Young*, 2 Serg. & Rawle, 388. As regards them, it was complete. It was not an executory agreement, containing conditions to be performed *in futuro*, but a solemn and deliberate declaration, under hand and seal, that "a full and just partition" had been made. The different estates were appraised by impartial persons, and the parties accepted their respective allotments perfectly satisfied with them at the time. The agreement to contribute equally to satisfy the claims of the heirs of James Allen, could not affect the immediate binding effect of the partition. It was merely an agreement to satisfy those claims if they ever should be enforced, but the efficacy of the partition was entirely independent of it. Nor does the covenant to execute a formal deed of partition, give the agreement an executory character. It was nothing more than a covenant for further assurance, the fulfilment of which was not necessary to effectuate the partition. Many estates in Pennsylvania are held by a much less formal title. Under the agreement, the parties were fully secured in their respective possessions, and so considered themselves, for although by the covenant they were entitled to call for a deed, they never thought proper to do so. They cannot now avail themselves of this circumstance, to overthrow their own agreement. The appellants could not institute proceedings for a partition in the Common Pleas, for that would have been to disaffirm the partition which, they contend, had been already made.

The validity of the partition being established, the next question is, what was the proper remedy for the assignees of George Rhoads? The act of 1st of April, 1811, giving the Orphans' Court jurisdiction, comes in aid of the common law remedy of vouching the other tenants in common by force of the warranty in law, to give recompense on an eviction. This tribunal is the fittest we have for administering relief in such cases. It has the powers of a court of equity to a certain extent. *Yohe v. Barnet*, 1 Binn. 358; and most of the cases of contribution are

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in equity, where it is more easily enforced than at law. *Campbell v. Mesier*, 4 John. Ch. R. 339; *Clowes v. Dickinson*, 5 John. Ch. R. 240; *Stevens v. Cooper*, 1 John. Ch. R. 430; *Sir Wm. Herbert's Case*, 3 Co. R. 14. It is a proceeding *in rem*, and the Orphans' Court have power to call before them all the parties interested; to act either with or without the intervention of a jury, as a court of equity, and to do full and complete justice between the parties. *Guier v. Kelly*, 2 Binn. 299; *Nailer v. Stanley*, 10 Serg. & Rawle, 454. It is, indeed, doubtful whether an action at common law would lie in Pennsylvania for contribution in a case like the present. If it would, the courts must assume the jurisdiction, as they did in the case of legacies charged upon land, *Brown v. Furer*, 4 Serg. & Rawle, 213; *Gause v. Wiley*, 4 Serg. & Rawle, 509. That was done from the want of a court of chancery, a reason which does not apply to this case, because the Orphans' Court possesses the [*430] *power of a court of chancery in reference to matters of this sort. There would, therefore, be no propriety in an assumption of jurisdiction by the common law courts, even if it were not expressly forbidden by the act of the 21st of March, 1806, sec. 13, 4 Sm. L. 332, which declares, that where a remedy is given by act of assembly, nothing shall be done according to the provisions of the common law. The Orphans' Court then having complete jurisdiction of the matter of contribution, it follows, that any question of law or fact, growing out of the principal subject must be within its cognizance, as an accessory. *Guier v. Kelly*, 2 Binn. 299. The question of the validity of the partition, was incidental to the principal question before the court, and so interwoven with it, that it was impossible to determine the one, without deciding the other. The Orphans' Court were, therefore, competent to the decision of the question, and it does not lie in the mouth of the appellees who denied the validity of the partition, and referred its decision to the court upon depositions, now to deny the power of the court to make that decision. If they were desirous of having a trial by jury, they might have had it, by applying to the court for an issue. *Wallace v. Elder*, 5 Serg. & Rawle, 146.

The amount by which the shares of Peter and John exceed equality, is a fund in their hands, belonging to the devisees in common, and equity will apply it in ease of the common burthen. Peter, the executor, having contumaciously refused to render an exact account of the debts due at the date of the partition, and he and John having acted in concert in this matter, the court will take it as confessed, that they did not exceed six thousand dollars. That sum being less than the amount due from them for owelty of partition, as appears from calculation,

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as well as the report of the auditors, it follows that they ought to have paid all the debts. Under such circumstances, a chancellor would not hesitate to decree that they should pay George the whole amount of what his land was sold for, with interest from the time of sale. Even this would not do him full justice, the true value of his land being his due, and not what it sold for at sheriff's sale. *Cheeseborough v. Willard*, 1 John. Ch. R. 415.

If there was any irregularity in the proceeding antecedent to the sale, it is not competent to Peter who was the author of it, to controvert the sale on that account. He asks of the court equity, and yet asks that a sale made by himself should be avoided on account of an irregularity committed by himself, to the injury of the purchaser and without giving him an opportunity of being heard. No other account than that which was the foundation of the sale, could be obtained. The executor refused to furnish any other, and no one else knew what debts were due. But there was no irregularity. The account was finally settled by the executor, within the meaning of the act of assembly. The final settlement of an account does not mean one which closes all the accounts of the estate. The final settlement contemplated by the act, is one confirmed by the Orphans' Court. There is an obvious distinction between the final settlement of an *account and the settlement of a final account. [*431] It is impossible the legislature could have meant the winding up of an estate. The object was to remedy the inconvenience and expense of a suit and sale by the sheriff by each creditor, by effecting a sale for the benefit of all, and this could only be done, while the debts remained due. At all events, the Orphans' Court having power to order a sale by an executor, and having done so, it is to be presumed, nothing to the contrary appearing, that all the preliminary requisites have been complied with.

Gibbons, Jones, and J. R. Ingersoll, for the appellants, contended, that the decision of the Orphans' Court in this case, was wholly unsupported by law. It is not sanctioned by any act of assembly, nor by the common law, supposing the Orphans' Court to have power to apply common law remedies. The whole proceeding originated in a misconception of the act of assembly and the powers of the court. Jurisdiction in cases of partition is given to the Orphans' Court, only in cases of intestacy. Act of 19th of April, 1794, s. 22. If the heirs, *sui juris* agree to make partition, the Orphans' Court cannot enforce the agreement. This must be done by an action upon the agreement according to its form and effect, or by ejectment. The subject-

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matter being the estate of an intestate does not make the agreement less a contract, or deprive it of any of its qualities, or change the jurisdiction through which it is to be enforced. A legal partition in this case could only be effected by deed, or by writ out of the Court of Common Pleas, conformably to the act of 11th of April, 1799, *Purd. Dig.* 683. The Orphans' Court is not the forum which has jurisdiction of the question in any shape in which it can be presented. It is not the forum either to enforce a contract for partition, or to make partition; it cannot compel the parties to make partition, nor perfect an imperfect one, nor decree a specific performance. The appellants claim what they call contribution, on the basis of the articles, alleging default in the appellees, but it is rather a proceeding to enforce the contract, than to obtain contribution, and beyond the control of the Orphans' Court. The proceeding is obnoxious to objection on another ground. The four children of Peter Rhoads' were devisees in common of his real estate, and if the alleged partition is invalid, as we contend, they are still tenants in common, and no one has any specific allotment. The loss therefore occasioned by the sale was common and apportioned by the mere act of taking the property. The act of 1st of April, 1811, does not apply to such a claim, but to specific claims of persons holding in severalty. If on the other hand the partition is valid, then the parties are in court, as contracting parties, having no common interest, but holding unequal portions by virtue of the articles. It follows that if George has sustained a separate loss, it is by virtue of the articles, and not of the will, which was the foundation of this title as tenant in common only. By the will, he had a common interest in the whole. By the partition, he parted with this common interest, and acquired a sole interest in a part. This sole interest he brings into court as a grantee, and not as *a devisee, for partition [*432] by tenants in common must be by conveyance, though it is otherwise between partners at common law. If partition has been made, the parties as a necessary consequence, have equivalents, if not in land at least in value, so that in the contribution to pay debts, each should contribute equally. But this was not the decree of the court. It was that John should pay the whole, which is entirely inconsistent with the idea of contribution. The result therefore is, that if the partition was valid, the court has no jurisdiction, because George claims his allotted portion under the articles and not by the will, jurisdiction being given only in cases of specific devises, "where the land devised to be sold, shall have been in any manner devised to any heir or devisee." If the partition was not valid, then the decree of the Orphans' Court was wrong in declaring that it was valid. At all events

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the court must exercise its jurisdiction, according to the devise *modo et forma*, and not according to a contract materially changing the interests, estates, and tenure created by the will. The whole of the proceeding was founded on a misconception of the powers of the Orphans' Court. The act of 1st of April, 1811, gives no contribution in case of eviction, after partition. It applies only to estates given by will. That court has no power to enforce common law remedies, and if it had, the provisions of the common law differ widely from this decree. If the partition is valid, it is in the nature of an exchange, in which land is given for land, and in which there is a condition of re-entry and a warranty to give recompense in case of eviction. *Bustaret's Case*, 4 Co. R. 121, b. Yet the two remedies amount to the same thing. If the party evicted re-enters, he gets back his land; if he sues on the warranty, he recovers the same land. 10 Vin. 138; *Exchange*, P. 1. By the application of this principle, George Rhoads by re-entry, would be remitted to his estate in common. So in the case of partition between parceners. By eviction the partition is defeated, and by re-entry the party is remitted to the undivided interest in co-parcenary. 16 Vin. 230, Q.; 3 Co. Litt. 273, 4. Or a parcener may sue upon the warranty, but the recovery is not according to the loss, but of an aliquot part of the residue. 4 Co. R. 120; 1 Prest. Ab. 303, 304; *Cro. Eliz.* 902. The same law prevails in the case of eviction of tenant in dower. This sort of redress is equitable, and the assignees of George Rhoads, must be content with it, unless there be matter of contract on which they can rely. If however the agreement was not a mere partition, but a contract was superadded, the argument is strengthened whether the contract be considered a covenant of warranty or a covenant to pay the estimated values of the land, or any other covenant. As a contract it cannot be enforced by the Orphans' Court, as it would deprive the party of his constitutional right of a trial by jury in the common law courts. If there was no express covenant, the law will not imply what the Orphans' Court decreed. The parties to the alleged partition were purchasers from each other, subject to a charge, and the Orphans' Court might have [*433] prevented injury by a *sale of the purpart of each, if the parties admitted the partition. This was all they could do. The fluctuation in the value of lands renders a money contribution inequitable. It would make eviction a benefit. *Nailer v. Stanley*, 10 Serg. & Rawle, 450, is in conformity with these views. The appellants have no right to the money decreed upon any principle of law or equity, or under any provision of the act of assembly. They can claim it in no form un-

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less they can enforce the contract, which brings us back again to the question of jurisdiction.

But there was no valid partition. Catharine Blumer, one of the parties to it, was a *feme covert*, who underwent no separate examination, and made no separate acknowledgment of the agreement. She died leaving minor children. The proportion allotted to her was the least, and therefore to the extent of the deficiency she was a seller to the other parties. There was however no consideration for the purchase, and no promise by the other parties to pay. If there had been, it would have enured to the benefit of her husband. There was no promise to pay debts, and if there was, this was not *owelty*, for personal security is not *owelty* for realty. *Owelty* must be something that can descend to the heir; such as a rent charge, a right of way, a common of pasture. 16 Vin. Partition G. 2, p. 224; Co. Lit. 10, a; Plowd. 134; Bro. Partition, 25. Catharine might have bound herself if she had thought proper, but she did not, and consequently the other parties are not bound. Her act was absolutely void, and could not be rendered valid, which distinguishes her case from that of an infant whose acts are merely voidable. *West v. West*, 10 Serg. & Rawle, 445. The articles contemplated, the execution of deeds, and were not designed to be in themselves a binding partition. They were merely the first step towards what was to be consummated by other acts for the performance of which the agreement stipulated. The utmost that can be said is, that an equitable partition was made, but in matters of partition, equity will do nothing unless the title is perfect and undisputed, which was not the case here. The interest of Catharine remained unaffected by the agreement. A married woman can do nothing to affect the title to her real estate except in the manner pointed out by the act of assembly, and no length of acquiescence in such an agreement will give it validity. *Willes*, 248; *Whaley v. Dorsey*, 2 Sch. & Lef. 367, 371; *Bunb.* 322; *Wilkin v. Wilkin*, 1 John. Ch. R. 111; *Cartwright v. Pultney*, 2 Atk. 380; 2 Vern. 232. There are other difficulties too, in the way: It is assumed that Peter and John were to pay the debts, but of this there is no proof. In April, 1815, the debts were not known, and there is no promise by one to pay them more than by another. The language of the articles, is the same in respect to all. A promise was made to no one; no one was designated to receive the money, or to pay the debts. John, who is now attempted to be charged with them, could not pay them, for he was not an executor. The order of the Orphans' Court required the auditors *to ascertain [*434] the debts then remaining due, and instead of doing this, they estimate by conjecture the debts due at the time of the

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testator's decease. They assess no contribution upon the heirs, towards the outstanding debts, but proceed against John alone, and direct him to pay the full value of that part of George's portion, which was sold. This was no compliance with the order, and it is an abuse of language to call what they directed contribution. They ought, if they assumed the validity of the partition, to have made an assessment on each of the devisees, according to the ratio of the estimated value of their respective allotments, which would have been contribution upon the basis of the agreement. The Orphans' Court had no jurisdiction for another reason. The act of 1811, gives it jurisdiction, only after the final settlement of an account, and a decree of sale founded upon an account not final, gives no title. The proceedings in this case seem to have had in view the act authorizing a sale in a case of intestacy, where there is a deficiency of assets, rather than the act of 1st April, 1811. It is alleged that the executor has filed an account in the register's office, and not that he has finally settled his account in the Orphans' Court, which the act requires. The sale therefore was void, and the decree for contribution, which was an incident to that sale, was also void. No act done by the appellees, can estop them from alleging the want of jurisdiction. No estoppel ever gave jurisdiction. It cannot be given even by consent. Viewing this matter in any light in which it can be placed, the decree of the Orphans' Court was wrong, and the Circuit Court did right in reversing it.

The opinion of the court was delivered by

ROGERS, J.—The creditors of George Rhoads applied to the Orphans' Court, of the county of Lehigh for contribution, on the ground that the property of George Rhoads had been taken to pay the debts of Peter Rhoads the elder, deceased, the property having been sold under an order of the court, decreeing a sale for the payment of debts.

The application was made, under the act of 11th of April, 1811, the preamble of which sufficiently explains the reason of its enactment. In all cases after the final settlement of any administration account in the Orphans' Court, if it shall appear there are not sufficient assets to pay and satisfy the balance appearing to be due and owing from the estate of the deceased, it shall be lawful for the said court, on the application of the executors or administrators, or any others interested therein, to make an order that so much of the real estate of which the deceased was seized or possessed at the time of his decease, shall be sold by the executors or administrators, as in the judgment of the court shall be sufficient to satisfy such balance.

The 4th of February, 1820, Peter Rhoads, acting executor of

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Peter Rhoads deceased, (George Rhoads having been previously dismissed,) petitioned the Orphans' Court for an order to sell, &c.

The 4th of *February, 1819, George Rhoads and Peter Rhoads, presented an administration account which [*435] on the 7th of May, 1819, was read and confirmed *nisi*. There was due to the accountants the sum of one thousand nine hundred and eighty-seven dollars and sixty-two cents, in addition to which there were debts outstanding, as was shown on the face of the account, which swelled the debts of the deceased to upwards of four thousand dollars. On this exhibit the executor prayed an order of sale, which was granted, and the property of George was sold and applied to the payment of debts, &c. This was then such a final settlement of an administration account as comes within the meaning of the act; the amount of the personal estate as appeared to the court in an account presented, advertised, and confirmed, to be insufficient to pay debts. The requisition of the act of 1811, being then complied with, the court was justified in its order of sale, for the purposes mentioned in the petition of the executor. The act does not require that the estate should be finally settled, but that an administration account should be passed and confirmed in due form of law; but is this such a case as authorizes the Orphans' Court to decree contribution? It has been properly observed, that the act of 1st April, 1811, does not create the right to contribution, but prescribes the remedy. The act is remedial, and should receive a favourable construction. There is a peculiar propriety and fitness in the Orphans' Court which ordered the sale, and which has power to bring all the parties in interest before them, decreeing the contribution. The creditors of George, whose property has been taken, apply to the court under whose direction this has been done, to compel the parties in interest to contribute in proportion to the benefit they have received. It is particularly proper, here, that the court should give a remedy, as it was on the petition of Peter, the acting executor, that the sale was decreed, and an objection of the want of form comes with a bad grace from him. The language of the act is sufficiently broad to embrace the case. In all cases where the court have power to order a sale, they have likewise the power to decree the contribution, which shall be made by the heirs and devisees respectively. Had the devise been made in severalty, it would scarcely be doubted that the creditors of George would be entitled to contribution, and what difference can it make, that the devise is to the sons as tenants in common; they are in either as devisees or heirs, with an undivided interest it is true, but this is afterwards converted into an interest in severalty. Had the lands been divided by writ of partition, George would

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have been entitled to redress in the Orphans' Court, for the heirs are not bound to wait until the debts are paid before they make partition. It may be done immediately on the death of the testator or intestate. It is said that no partition was made; and if this be so, then the creditors have no right to contribution. They would be entitled to the share of the land which remains after the payment of debts. Whenever a question of the kind arises incidentally or directly, the Orphans' Court must [*436] *decide it, or may, if they deem proper, direct an issue, but this is no reason for denial of jurisdiction to the court. The property was valued and appraised in lots, numbered by men chosen by them without any designation of the devisees, to whom the respective portions were allotted. With the appraisement as the basis of the arrangement the devisees enter into the agreement of partition of the 15th of April, 1816. This it is said is an agreement for a partition, and not a partition of the property. The words of the agreement are "that the said parties have made and by these presents do make a full and just partition of all the messuages, lands, tenements, and hereditaments, which they now hold as tenants in common by virtue of the last will and testament, &c." In every agreement the intention of the parties is to govern, and there is no rule of law so stubborn that it will not recede from words to enforce the meaning of the parties. If the intention is clear that an estate shall pass, courts will construe deeds in support of that intention, different from the formal nature of those deeds. *Plow.* 290; 3 *Burr.* 1477; 1 *Atk.* 8; 4 *Yeates*, 298; 1 *Yeates*, 393.

When we couple the words of the deed, with acts of the parties in taking possession of the respective portions allotted in the agreement, improving, and selling parts of the same, the intention cannot be mistaken. The deed contains a covenant for the execution of a deed of partition, and such other legal assurances as might be deemed necessary on or before a certain specified time. No other assurance would seem to have been deemed necessary, and it will not now do to permit the partition to be avoided for that reason, when the circumstances of the parties and the value of the property have so materially changed. It is further objected that Catherine Blumer should have acknowledged the instrument in due form of law. To this I answer, that the act of 24th February, 1770, does not apply to a partition, but establishes a mode by which husband and wife may convey the estate of the wife. In partition under an order of the Orphans' Court the wife is not made a party. The order is made on a petition by the husband, in right of his wife. I can perceive no good reason why such a partition as this should not be valid, particularly when it appears to be for the advan-

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tage of the wife, and for the benefit of her heirs, who now seek its enforcement against the executor, on whose petition the land had been sold. And this is in accordance with the principle of the court, in *Burke v. Lessee of Young*, 2 Serg. & Rawle, 386. There is no person here making any objection who has a right to object.

Judgment of the Circuit Court reversed.

Cited by Counsel, 1 Wh. 299; 4 Barr, 498; 5 H. 124; 1 Wr. 62; 7 Wr. 417; 11 Wr. 73; 3 S. 509.

Cited by the Court, 30 S. 231, s. c. 2 W. N. C. 258.

*[PHILADELPHIA, MARCH 30, 1832.]

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Gibblehouse and Another *against* Stong.

IN ERROR.

The declarations of a person while holding the legal title to an estate, that he was merely a trustee for another, who had paid the purchase-money, are admissible in evidence against those claiming under him, although he be, at the time such declarations are offered in evidence, in full life, within the reach of the process of the court, and capable of being examined as a witness.

THE record of this case having been returned on a writ of error to the Court of Common Pleas of *Montgomery* county, accompanied by a bill of exceptions to the rejection of evidence by the court below, it appeared that Frederick Stong, the defendant in error, brought an ejectment against the plaintiffs in error, John Gibblehouse and John Brandt, to recover two lots of ground in Whitpain township, one of them containing three-quarters of an acre, with a dwelling-house, and other buildings erected on it, and the other containing five acres. The plaintiff below claimed under a deed dated 1st of April, 1813, from David Johnson, in whom it was admitted the legal title to both the lots was vested, one of them by deed dated the 1st of April, 1811, from S. Slingluff, and wife, the other by deed dated the 13th of May, 1811, from Samuel Ashmead to him. Gibblehouse was the tenant of Brandt, who alleged that David Johnson was the mere trustee of his brother Edward Johnson, for whose use he held the legal title to the lots in dispute, and that he Brandt, had purchased them as the property of Edward Johnson at a sheriff's sale under an execution upon a judgment obtained by Brandt against Edward Johnson.

On the trial of the cause in the court below, after a variety of testimony had been given by both parties, which will be found stated in the dissenting opinion delivered by Judge Huston,

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George Gregor was produced and affirmed as a witness, for the plaintiffs in error. He testified as follows: "Edward Johnson bought the three-quarter acre lot from Slingluff. David Johnson and Edward Johnson told me so." The counsel for the plaintiff below, then objected to this evidence, when the defendant's counsel offered to give in evidence, "declarations made by David Johnson, after the purchase of the property in dispute from Slingluff and Ashmead, and while he held the legal title to it, and before it was afterwards sold to any one, that he had never paid any part of the purchase-money, but that he held the title for the property as the trustee of Edward Johnson, and that Edward Johnson had paid the purchase-money for it." To [*438] this *evidence the counsel of the plaintiff below objected, upon which the court decided "that the witness could not give any evidence of any declarations made by David Johnson, unless such declarations were made at the time or immediately before, or immediately after, the execution of the deeds to him, or by him to the plaintiff, Frederick Stong, or in the presence of the opposite party; the said David Johnson being a competent witness, and from anything which appears to the contrary, in full life, and within reach of the process of the court."

To this opinion the counsel of the defendant below excepted, and assigned it for error in this court.

The cause was argued by *T. Sergeant* for the plaintiff in error, and by *Kittera* for the defendant in error; after which

The opinion of the court was delivered by

ROGERS, J.—The declarations of a person, while in the possession of the premises, against his title, are always admissible, not only against him, but against those who claim under him. The general principle is conceded; but with this qualification, that when the person whose acknowledgment is relied on is alive and a competent witness, that then he must be examined: that his declarations cannot be received. I have examined all the cases, and I cannot perceive a trace of any such exception. In most cases it is true the party was dead, and this is usually the case in fact, for it is the declarations of an ancestor that are most commonly offered in evidence. It has in no case however been made a subject of inquiry whether the person was dead or alive, a competent witness or otherwise, and this surely would have been the case had any such qualification of the general rule existed. The reason of the rule is at war with the exception. The point falls within the well-established principle that although a man's declarations are not evidence for him, they are strong

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evidence against him. The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favour. We can safely trust a man when he speaks against his own interest. It is not conclusive, but is unquestionable evidence, entitled to some weight against himself, and those who claim under him. *Bassler v. Neisly et al.*, 2 Serg. & Rawle, 353. The defendant's counsel offered to prove declarations made by David Johnson, after the purchase from Slingluff and Ashmead, and before the sale of the property to any person, that he, David Johnson, never paid any part of the purchase-money, but that he held the title as trustee for Edward Johnson, and that Edward Johnson had paid the purchase-money for it. The court decided that the witness could not give any evidence of any declarations made by David Johnson, unless such declarations were made at the time, or immediately before, or immediately after the execution of the deeds to him, or by him to the plaintiff, or in the presence of the opposite party; David Johnson being a competent witness, and from *anything which appears [*439] to the contrary, in full life, and within reach of the process of the court. Suppose this declaration had been in writing, can David Johnson by a subsequent conveyance, prevent the party in whose favour the declaration was made, from giving it in evidence against the party who claims under him? And where is the difference between written and parol testimony, except in the certainty; and particularly in cases of personal property, which may pass by parol, and to which the principle also applies? Can it be that the party is forced to rely upon the testimony of Johnson, who it may be has assigned for the purpose of getting rid of his own admissions? If the defendant must examine Johnson they must hear their witness and cannot afterwards discredit him. They will in fact be utterly precluded from the testimony by the act of Johnson, and that this cannot be done is decided in *Long v. Bailie*, *Indorsee of Buchanan*, 4 Serg. & Rawle, 222. The defendant acquires an interest in testimony, of which he cannot be deprived by the act either of a witness or a party. The distinction is taken between an interest cast upon him by operation of law, and an interest acquired by the act of the witness himself.

Whether the admission of the testimony will vary the result is not now the question.

We think there was error in rejecting the testimony, and that the judgment should be reversed.

HUSTON, J.—The only error assigned in this record is contained in a bill of exceptions to the opinion of the court in re-

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jecting certain testimony. To understand the matter decided, it will be necessary to state what was the matter trying, and what had been proved.

Frederick Stong brought an ejectment to recover a house and three-quarters of an acre of land (describing it,) and also five acres used and occupied with the three-quarters of an acre; and he deduced title to the house and lot on which it stood, by a deed, of 1st April, 1797, John Dutterer and wife, to S. Slingluff, and deed of 1st April, 1811, Samuel Slingluff and wife, to David Johnson, and deed of 1st April, 1813, David Johnson to Frederick Stong, the plaintiff, and he proved possession, first, in Dutterer, then in Slingluff, then in Edward Johnson, and proved and read a lease from Frederick Stong to Edward Johnson, dated shortly after Stong's purchase; he then proved the payment of money, which was contained in two bags; the amount witness could not state. He also traced title to the five acre lot; 1st April, 1795, deed John Doll and wife to John Wood. 4th of August, 1808, deed John Wood to William M'Dowell. 2d of April, 1810, deed William M'Dowell to Samuel Ashmead. 13th of May, 1811, deed of Samuel Ashmead to David Johnson.

It was proved that Edward Johnson lived in the house and occupied both lots from 1811 till 1827. That in the neighbourhood many considered him the owner: That he built a weaver's shop, being a weaver, and a stable and a threshing-floor at the [440] end of it, and planted some fruit trees. Edward Johnson was the brother of David Johnson, and was married to a sister of Stong the plaintiff. The defendant then showed the record of a judgment, John Brandt v. Edward Johnson, in 1823, execution and proceedings ending in a sale of the premises to Brandt. Then an ejectment, John Brandt v. Edward Johnson, of August, 1826, and a judgment and *hab. fa. possessionem* executed, on which Gibblehouse was put into possession as tenant of Brandt.

The defendants called S. Slingluff who had sold and conveyed the house and lot to David Johnson. He proved that the bargain was made between him, and Edward and David Johnson: That Edward was at the time his tenant in this house, but had been broken up by his creditors, and all he had sold by them: That he made the bargain with them both; part was to be paid at signing the articles, part at signing the deed, and to get judgment bonds, and mortgage for the residue: That, when the articles came to be written, and the deed and mortgage and bonds, all were in the name of David Johnson alone. That David lived at some distance, and the witness seldom saw him: That the first and second payments were made by the

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hands of Edward Johnson; when the mortgage fell due Frederick Stong paid one hundred pounds of it, and the rest came from Edward Johnson: That the witness did not know whether David exercised any acts of ownership, nor whether David or Edward actually paid for the buildings. The defendants also called Samuel Ashmead, who conveyed the five acre lot to David Johnson. He proved that he made the bargain with Edward, and was paid through William M'Dowell: That he never spoke to or saw David Johnson about it: That he conveyed to Edward and not to David, but on being shown his own deed to David, said he had been mistaken, and made some other explanations. I do not pretend to have stated all the testimony minutely, but enough to show that the matter trying was whether David Johnson had ever been owner, or a naked trustee for Edward, and next whether Stong was the purchaser from David in his own right, or as a trustee, in whole or in part for Edward; whether if David was a trustee, Stong purchasing on the faith of a deed, in fee simple, was not safe as an innocent purchaser without notice, from one appearing to have the fee simple; or whether he had notice of the trust, and so became himself a trustee for Edward. In this stage of the cause, the defendants called a witness who commenced by saying, "Edward Johnson bought the house and three-quarters of an acre from Slingluff. Edward and David Johnson both told me so"—and was stopped from proceeding further. On a call by the plaintiff's counsel, the defendant's counsel said, we mean to prove by this witness, "declarations made by David Johnson after the purchase from Slingluff and Ashmead, and before the sale by David Johnson, that David never paid any part of the purchase-money, but that he held the title as trustee for Edward, and that Edward paid the purchase-money for it." To this the plaintiff's counsel objected, *and the court decided that the witness could not give [*441] any evidence of any declaration made by David Johnson, unless it were made at the time, or immediately before or after the execution of the deed to him, or by him to the plaintiff Frederick Stong, or in the presence of the opposite party, he, David Johnson, being a competent witness, in full life, and within reach of the process of the court. To this exception was taken; and I see no error, at least against the defendants. It has been contended that by a series of decisions in this state it is settled, that the declarations of a former owner of property, made while he was owner, are evidence against the party claiming under him; and that this rule is universal, and applies to cases where such former owner is alive, is entirely disinterested in the matter trying, and is standing in court and there is no

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objection to examining him as a witness. On the other hand it is contended, that the rule is not universal: That declarations of a former owner are only evidence to establish boundary, pedigree, and custom: That it does not extend to permit parol evidence to contradict written and recorded deeds, and destroy titles good by such deeds, and proved by those who never heard of such parol declarations: and at all events it is limited to cases in which the person whose declarations are proved is interested, and cannot be examined, or is dead, or out of the reach of the process of the court; but that if he is alive, in court, or can be brought there, and is totally disinterested, he must be examined on oath, an opportunity given to cross-examine, and his declarations not on oath, are not in such case to be proved; and that the statute of frauds forbids that a title depending by law on written and recorded deeds, should be destroyed by parol evidence of parol declarations, which may have been made, or may not, and which if made, did not at all affect the rights of him who uttered them, except as to those who may have purchased on the faith of such declarations.

It is the safest rule to consider general expressions as applied to the case trying, and if they are true in that case it is not necessary that the court should lay down all the exceptions. This can be done as cases occur requiring such exceptions to be noticed. Boundary, as used in law proceedings, includes the extent of possession, and who was in possession of the *locus in quo*; it also includes questions of where a survey was laid, especially if alleged that its location has been changed.

The cases cited by the plaintiff are, 2 Dall. 93. In an ejectment against a widow, evidence that her husband in his lifetime admitted he was the tenant of the plaintiff was admitted. He might have been tenant from year to year, and this proof of parol tenancy did not impair the effect of the statute of frauds.

Bassler v. Niesly, 2 Serg. & Rawle, 354. The defendant in ejectment claimed by a parol contract with the father of the plaintiffs, and money paid and possession delivered; to prove the contract, the admissions of the deceased father of the plaintiffs were proved. This was to make the case an exception out of the statute of frauds.

*Wiedman v. Kohr, 4 Serg. & Rawle, 174. One of [*442] the parties in an ejectment claimed under a very old warrant, on which for a long time no survey was made, or if made, was not returned (see this case fully reported in 13 Serg. & Rawle, 17). Evidence was offered to prove that a former owner of this warrant, while he was owner, admitted that it was not surveyed on the land in question, and the court below rejected the evidence, and this court reversed the decision for this reason,

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"We may safely admit the declarations of a man against his own interest, as no one ordinarily makes such admissions;" and this opinion, and the reasons for it, are the reliance of the plaintiff so far as relates to our own decisions. It is a very short note of the case. It was clearly an admission as to boundary, at a time too when no deed, and no survey returned and filed, were contradicted by the admission. It does not appear whether the former owner whose declarations were proved, was dead or alive, nor whether he was within reach of process of the court, and whether he was disinterested and so a witness, or not; it is therefore not of much force, as I shall show we have several other cases not cited, in most of which the persons whose declarations were proved were dead, and none in which he appears to have been alive and disinterested. In *Strickler v. Todd*, 10 Serg. & Rawle, 63, the decision of the Common Pleas was reversed, among other things, because declarations of former owners respecting a water right were rejected. By this case, all those whose declarations were offered to be proved were dead; and further, a parol license to use the water forty years ago, was held to be now as good as a deed.

The opinion of the court in all the cases cited, and most if not all those in our reports which I have found, were delivered by the late Chief Justice. And in *Buchanan v. Moore*, 10 Serg. & Rawle, 275, the same judge in delivering the opinion of the court says, quoting Phillips' Evidence, "In all cases which have been mentioned on this subject (parol evidence of declarations) the person who made the declaration was deceased at the time of trial," and he adds, "there is great reason for the law being so held. Why should the declarations without oath of a person who may be produced and examined on oath, be evidence? Why should the party against whom the evidence is offered be deprived of the opportunity of cross-examining? In the case of death there is a necessity. But while the witness is living there is no pretence for dispensing with the general rule which rejects all testimony except on oath, and in the presence of the parties to the suit." This opinion is not inconsistent with any of the former cases, but mentions a circumstance (that the party was alive and not interested) not brought into the view of the court in the former cases, and I know of no answer to the conclusion to which the court came.

I have looked at some New York cases founded on *Davies v. Pierce et al.*, 2 Durnford & East, 53, in which the subject proved was, under whom the persons, long since dead, had stated they held the land.

1 John. 348, was what a deceased person said as to whether she

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[*443] *held personal property as her own, or in right of her son, and decided on the authority of the last case.—4. John. 230. The declarations of a former owner were admitted, and it does not appear whether the owner was dead or not, or interested or not. It is a short case, and the court say it is governed by the two cases next above. 10 John. 377. The declarations proved were as to boundary, and were the declarations of the father of one of the parties who had died in possession. In *Woodford v. Pain & Lake*, 15 John. 493, that court expressly decided, that the declarations of a former owner who is alive and may be examined, cannot be proved. In a previous case, *Jackson v. Shearman*, 6 John. 19, this matter had been more considered and the court say: “The acknowledgments of a party as to title to real property are generally a dangerous species of evidence, and though good to support a tenancy, or to satisfy doubts in case of possession, they ought not to be received as evidence of title. This would be to counteract the beneficial purposes of the statute of frauds. Title rests on written evidence, and not on the parol declarations of the parties.” And in *Pickering v. Stapler*, 5 Serg. & Rawle, 107, this court decided, that under the word appurtenances, a water right passed with a mill, though the owner, when he was executing the deed, declared he had not purchased the water right and was not selling it. I give no opinion, however, as to how far the right, as expressed in the deed, may be affected by the declarations of a person while owner, because, as I view this case, that point does not arise, for by the very terms of the offer, David Johnson, whose declarations were offered to be proved, never was owner. The offer was to prove that David Johnson never paid any part of the purchase-money: That he was a naked trustee for Edward Johnson, who bought and paid for the land. Now, if this was so, and David Johnson always said so, his declarations were not “the declarations of an owner to be confided in, because he would not be supposed to speak against his own interest.” The offer went to prove that he never claimed any interest, and if so, he would at all times have been a good witness as to his property, in any case, and all cases, except where he was a party on record, and as such, liable to costs, because his name was used on the record. The court below so understood it, and the plaintiff and defendant here understood all this was to be proved by the declarations of David Johnson. He is stated and admitted to be a competent witness, alive, and, it is said, within reach of the process of the court. As the counsel stated here in the court-house, he had no interest, the plaintiff offers to prove he never had, why then must F. Stong, who claimed an interest and was a party, be affected by David’s de-

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clarations when not on oath? Why shall he be prevented from a right of cross-examination? Or why might not the plaintiff as well have proved the declarations of any other witness in the cause, who never had any interest in the matter trying?

The judge admitted that if David Johnson had informed Stong that he, David, had no interest, this might have been proved. But if *David was a naked trustee, and Edward paid all the money, and if Edward had held a de- [*444]claration of trust in his pocket, but not recorded, and David had sold to Stong who had no notice of the trust, and who had paid his money to David, or what is equivalent, had paid his money by David's directions to satisfy David's mortgage, Stong would be protected, at least to the extent of the money paid, against Edward and all claiming through him. *Lazarus v. Bryson*, 3 Binn. 54; *Peebles v. Reading*, 8 Serg. & Rawle, 484. If, then, David Johnson was a trustee, and never had any interest, and never claimed any, and was alive and could be had, his declarations were not evidence, and although he was a trustee, yet if F. Stong did not know it, and bought and paid his money without notice, to prove David a trustee would not affect him; and, clearly, what ought not to have weight in deciding a cause, what may mislead a jury and induce them to decide against law, but what cannot avail the party offering it unless the law is disregarded—ought not to go to a jury.

Believing, then, the law to have been settled in this state by *Buchanan v. Moore*, 10 Serg. & Rawle, 275, and so considered by the profession, and by the several courts of Common Pleas as well as the one which tried this cause, I would not lightly change, but, on full reflection, I believe, it was then settled on principle, and ought not to be changed. And that if it is in any case to be modified, this is not such a case; for the title of the plaintiff depended on facts and recorded deeds, and could not be affected by parol declarations of any prior owner, unless he was induced to purchase by such declarations, or unless they gave notice of some thing affecting the title; but in the latter case notice to a stranger was not notice to the plaintiff. The court admitted declarations to the plaintiff, rejected parol declarations to others, and, I think, rightly, whether the former owner was dead or alive, unless they went to prove boundary in the sense I have stated, or pedigree or custom; and further, that where such declarations can be proved, it is only when the person who used them was owner when he used them, and is dead, or out of the reach of the process of the court, or interested.

KENNEDY, J.—In support of the opinion of the court below, the statute against frauds and perjuries has been called in, and

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the case of *Church v. Church*, 4 Yeates, 280, cited, where it was decided, that the declarations of the grantee made after the execution of the deed, "that she had paid no part of the £800 mentioned in the deed as the consideration, but that she held it in trust for the family;" could not be received in evidence, because, as the court said, "it would militate against the act of frauds and perjuries; the greatest dangers would ensue; that there was no resulting trust there." From which we must necessarily infer, that if the declarations of the grantee had been such as tended to prove a resulting trust, they would, in the opinion of the court, have been admissible. If then, the declarations of David Johnson, which the plaintiffs in error offered to [*445] give in evidence, tend to prove a resulting trust, the case of *Church v. Church*, is an authority against the opinion of the court below. A resulting trust in land is such an interest or estate as arises and passes by operation of law, which by the express terms of the act against frauds and perjuries is excepted from its operation. To show what is meant by a resulting trust, how it is created, and that the declarations of David Johnson offered in evidence, went directly to establish such trust, I refer to what is said by Mr. Justice Duncan in *Wither's Appeal*, 14 Serg. & Rawle, 193. "Trusts," says he, "arising by act or operation of law, are when trust money has been laid out in lands, or where one pays the money and the conveyance is made to another. These, and cases falling within the same reason, are the only cases of resulting trusts by act and operation of law, which are within the exception in the act of assembly," and then he refers to *Wallace v. Duffield*, 2 Serg. & Rawle, 521, and *Stiner v. Stiner*, 5 Johns. Ch. Rep. 1, which see. From this it is obvious that the declarations of David Johnson established and met the case of a resulting trust exactly. They went to prove that although the conveyance was made to himself, yet the purchase-money was paid by Edward, and thus a trust in favour of Edward resulted to Edward Johnson by "act and operation of law," and of course the act against frauds and perjuries interposed no objection to the admission of the testimony. See also *German v. Gabbald*, 3 Binn. 304; *Peebles v. Reading*, 8 Serg. & Rawle, 492, in addition to the above authorities, which I quote merely to show that what is properly called a resulting trust may be established by verbal testimony, without intending to give my assent to anything that is said in these cases about other trusts being created and passed without writing.

It is also argued that the declarations of David Johnson were rightly rejected upon the principle that they were not made upon oath or affirmation, nor yet in the presence and hearing of the adverse party, but made in his absence when no opportunity was

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afforded of a reply, much less of a cross-examination, and as David Johnson was within the jurisdiction of the court, and was a competent witness, he might have been produced to testify to the facts, which would have been better evidence than his declarations or admissions. And in support of this, *Buchanan and others v. Moore*, 10 Serg. & Rawle, 281, is cited. There the late Chief Justice Tilghman delivered the opinion of this court, in which he says "the sixth exception was to part of the testimony of Matthew Woodburn a witness for the defendants, which the court rejected. Woodburn was describing the boundaries of the defendant's land, and mentioned a certain line as having been shown to him by William Appleby who was living at the time of the trial. The rule is, that in cases of boundary the declarations of deceased persons are evidence. The law on this subject is accurately stated in 1 Phil. Evi. 182 (New York ed. by Dunlop) where the general rule is given with the exceptions; and in page 164 after citing a variety of cases, it is said, that in all the cases which have been *mentioned on this sub- [*446] ject, the person who made the declaration was deceased at the time of the trial." Then the Chief Justice proceeds further to say, "there is great reason for the law being so held. Why should the declarations without oath be evidence? Why should the party against whom the evidence is offered be deprived of the opportunity of cross-examining the witness? In case of death there is a necessity. But while the witness is living, there is no pretence for dispensing with the general rule, which rejects all testimony except on oath and in the presence of the parties to the suit." The decision of the court here was not only correct, but I am willing to admit that everything said by the Chief Justice is likewise so. But it will be seen in the sequel, I think, that it is not applicable to the case before us. The testimony in *Buchanan v. Moore* was purely of hearsay character, with regard to which the general rule is well settled, as there stated, that it cannot be received, except in certain cases from necessity, when the facts offered to be proved from their very nature are incapable of the ordinary means of proof; such as questions of pedigree, character, prescription, custom, boundary, and the like. It is manifest that some of these matters from their very nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and hearsay would seem to be the next best evidence to which recourse must therefore be had. 1 Stark. Evi. 54, part 1; Bull. N. P. by Bridg. 294, b, n. (d). But in the case before us the testimony offered and rejected, was not of that character, which in a technical and legal sense, comes under the denomination of hearsay. It comes under what is considered the declarations or

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admissions of the party to the suit or his privies, that is, those under whom he claims; in respect to which the general rule of law is just as well settled that they shall be received in evidence as that hearsay shall not. All a man's own declarations and acts, and also the declarations and acts of others to which he is privy, are evidence, so far as they afford any presumption against him, whether such declarations amount to an admission of any fact, or such acts and declarations of others to which he is privy afford any presumption or inference against him. 1 Stark. Evi. 51, part 1, sec. 31. This rule is founded upon a principle of human nature that governs universally, and prevents every one from admitting or stating a fact against his own interest unless it be true, and hence it is considered quite as good a security for truth as the obligation of an oath upon a disinterested person. It is never looked upon as secondary evidence, but evidence of the highest character, of the very first degree in either civil or criminal cases. Gib. Evi. 123, Philadelphia, ed. [137.] "The party's own confession of a crime is the clearest proof in the law." Hardr. 139. Stone, whose case is reported in Dyer, 214, b, 215, a, was convicted upon evidence of his own confessions, of murder, and hanged. The confessions of the party himself, which I do not understand to be denied, have always been considered good and admissible evidence of any fact admitted by [*447] them to be true, and may *be given in evidence to prove it, notwithstanding the confessions might be such as to show that twenty witnesses were present who could all testify to its existence or non-existence, and who might all appear to be in the court-house at the time when such confessions should happen to be offered in evidence against the party making them. And this rule of admitting the confessions or declarations of the party extends not only to the admission of them against himself, but against all who claim or derive their title from him; in other words, between whom and himself there is a privy. There are four species of privy; privy in blood, as between heir and ancestor; privy in representation, as between testator and executor, or the intestate and his administrators; privy in law, as between the commonwealth by escheat and the person dying last seised without blood or privy of estate; and privy in estate as between the donor and the donee, lessor and the lessee, vendor and the vendee, assignor and the assignee, &c. Co. Lit. 271; 4 Co. 123-4.

Mr. Starkie in his Treatise on Evidence, page 48, part II. says, that an admission by the owner is sometimes evidence against one who claims to hold through him, and refers to *Ivatt v. Finch*, 1 Taunt. 141, and *Walker v. Broadstock*, 1 Esp. Ca. 458. In the first of these cases the declarations of a Mrs.

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Watson, a former owner of the property, which consisted of three mares, made by her while in possession of the mares, were held to be admissible evidence to show that she had transferred and parted with her right to them. It is true that she was dead, and therefore could not be produced as a witness, but from the opinion of the court it is evident that the circumstance formed even no part of the ground upon which her declarations were decided to be competent evidence. For the court say, that "the admission supposed to have been made by Mrs. Watson, was against her own interest, and that had the action been between Mrs. Watson and the plaintiff, then her acknowledgment that the property belonged to him might clearly have been given in evidence, and therefore it ought to have been received in that instance; because the right of the lord of the manor depends upon her title." The defendants in this case claimed under her as being the owner of the property at the time of her death, but her declarations were held to be admissible evidence to show that she had parted with her right to it before.

In the second case cited by Mr. Starkie in support of his last proposition mentioned above, the declarations of one who had been tenant in possession, and made during his possession, were given in evidence against the defendant who succeeded him in the possession of the estate, to show, that as the tenant of it, he had no claim to the common *per cause de vicinage* as appurtenant to the messuage which he had occupied; they were held to be competent evidence, and that too notwithstanding it appeared that this former tenant was still living, and might have been produced as a witness. The reasoning of the court in these two cases appears to me to establish the admissibility of the evidence upon general principles, and not upon *any particular or special attending circumstances which would render it competent "sometimes" only, as Mr. Starkie suggests. [*448]

The rule that when one claims title to property through another, he shall be affected in his right thereto by whatever would have affected the claim of that other, at or before he parted with and disposed of it, is more uniformly applied, and better understood, in cases of written declarations, or admissions made under the hand, or hand and seal, of the party, or have become matter of record against him. Accordingly Mr. Starkie, in his Treatise on Evidence, page 192, part II. sec. 61, lays down that "one who claims in privity with another is in the same situation with the latter as to any verdict or judgment either for or against him, whether he claims as privity in blood or estate, or as privity in law, so that the heir may give in evidence a verdict for his ancestor; and a verdict against the an-

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cestor binds the heir. So a verdict against an intestate or testator binds his administrator or executor." And upon this same principle it is, that executors and administrators, as also devisees, legatees, heirs, and next of kin, are all bound by the promises, whether written or verbal, of their respective testators or intestates, so far as they may have received estates from them that are liable, and the declarations and admissions of such testators and intestates are uniformly received in evidence against their devisees, legatees, heirs, and next of kin, so as to affect the estates which have passed to them.

Privies in estate, such as vendee and vendor, assignee and assignor, stand upon the same footing in this respect to each other that privies in blood do. I know of no distinction. That which is binding upon the vendor will generally be equally so upon his vendee; and whatever would have been admissible as evidence against the former, ought not only to be so against the latter, but ought to have the same effect too. Mr. Starkie in the same section, page 194, says, if a party after a verdict and judgment against him, assign his interest, the assignee is bound by the verdict, and for this reason, because "it would have been evidence against the assignor at the time of the transfer, and the substitute cannot be in a better condition than the principal." This principle is fully recognized by the Supreme Court of Massachusetts, in *Adams v. Barnes*, 17 Mass. Rep. 365, as between a mortgagor and his assignee. We shall presently see it recognised and applied in several cases where the declarations of the person under whom a party to the suit claimed, were admitted in evidence against him. I think it is difficult to perceive any good reason why the operation of the principle should not be the same in both cases, so far as to render the one as well as the other admissible evidence. The only difference between a verdict and judgment, and the written admissions of the party as evidence, is in the degree of credit to which they respectively are entitled; the first may be, and generally are, conclusive, whereas the latter may be controvertible; and the only difference again between written admissions or declarations, and those which are merely verbal, is, the uncertainty of the one [*449] and the greater *certainty of the other. For as to their admissibility they both stand upon the same footing, except as to matters of record, which on account of the high degree of credit to which they are entitled, being considered verity itself, are evidence for the party as well as against him.

It may perhaps be said that the rule of evidence in regard to the party named in the suit upon the record is different from that of any other person, because he cannot be called upon to give testimony, and therefore from necessity his admissions or

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declarations are received in evidence as the best that can be obtained under the existing circumstances, although but secondary. I have already shown from authority, and from reason too, as I believe, that such evidence in cases of the highest possible interest, even of life and death, as well as in those of property, is not considered secondary, but of the first and best character: and it will further appear that such cannot be the reason for admitting the declarations of the party named on the record, when we find it settled that the declarations or admissions of the party really interested, but whose name does not appear as such on the record, are also admissible in evidence. *Hanson v. Parker*, 1 Wilson, 257. And yet such interested party, as I apprehend, may be compelled as a witness, by the adverse party, to give testimony. 1 Hall's Law Journal, 221, Report of the opinion of the twelve judges of England on the question whether a witness may be compelled to give evidence against his interest; *Baird v. Cochran*, 4 Serg. & Rawle, 397; *Nass v. Vanswearinger*, 7 Serg. & Rawle, 192. Lord Ellenborough has given the true reason of the rule for admitting the declarations of a party in evidence, 11 East, 584, where he says, it "is founded upon a reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth." If true when made, and therefore receivable in evidence, his selling or disposing of the property afterwards cannot make his former declaration in respect to it untrue, nor furnish any reason, that I can perceive, which ought to derogate from its character as evidence. But I cannot avoid believing that as long as the great object of receiving testimony is to aid in and to promote the investigation of truth, the declarations or admissions of a vendor or assignor against his interest, made before the sale or assignment, may be more safely relied on and received in evidence against his vendee or assignee, than the testimony that would be given by such vendor or assignor himself, if the party claiming in opposition to his vendee or assignee, must be compelled to resort to him. Mr. Starkie in speaking of those declarations which compose part of the *res gestæ* being admitted in evidence, gives as a reason for it, that "they are the best evidence to prove the object for which they are admitted in evidence; since the party who made the declaration, if he were competent as a witness, would frequently be under a temptation to give a false colouring to the circumstance, when its tendency was known." 1 Stark. Evid. 49, part I. Does not this objection apply with peculiar force in favour *of admitting in evidence the declarations of a vendor made by him before sale against his vendee to invalidate the title, or to show that he held in trust for another? Is it not most apparent from what we know by

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experience of human nature, that a vendor who had placed himself in such a situation would in many, if not most instances, swerve from the truth, in order to rescue himself from the imputation that was about to be made against his integrity? His temptation to say the least of it, would frequently be very strong to give such a colouring to the whole transaction as he might think would present his own conduct in the most favourable point of view, without much regard to the truth of the case.

We have the decisions of the highest tribunals in several of our sister states in favour of the principle that such declarations or admissions are competent evidence, not only against the party who made them, but against all who stand in privity to, or claim under him.

The Supreme Court of New York in *Waring v. Warren*, 1 John. Rep. 343, decided that the declarations of a party holding adversely, are never received to support the title under which he claims; though they may be received when against it. And in conformity to this, the court there held that the declarations of Mrs. Nocus made before her marriage with Waring, the plaintiff in error, and while the goods were in her possession, stating that they belonged to Warren the defendant in error, but plaintiff in commencing the suit, and that they were not her own, were properly received in evidence, but that her declarations made at other times, before and after the marriage, could not be given in evidence by Waring. Also in the case of *Jackson v. Bard*, 4 Johns. Rep. 230, the same court decided, that the declarations of one Smith, made while in possession of the land in dispute, under a purchase of it by articles of agreement made with Samuel Dickenson, under whom both parties claimed, were admissible in evidence to postpone the claim of Smith, which was subsequently to his making the declarations, regularly transferred by him to Peter Linzey, and by Linzey to the defendant in the suit. Mr. Justice Thompson, who delivered the opinion of the court, says, "the declarations of Smith, made while in possession of the premises, as to his title, were admissible against Smith, and are also competent evidence against all who claim under him." From the report of this case it does not appear whether Smith was living and within reach of the process of the court or not; nor is this made the ground of the decision. It is put exclusively upon the ground that the declarations would have been good evidence against Smith himself, had he been the party to the suit, and the privity that existed between him and the defendant. It however must be admitted, that there has been a later decision of that court in *Hurd v. West*, 7 Cowen, 752, which militates against their former; in which it was held, that the declarations or admissions of the vendor of personal

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property, *though made before the sale of it, were not evidence against the vendee. Mr. Justice Woodworth, [*451] who delivered the opinion of the court, assigns no other reason for it, than that, "where one is competent as a witness for the party, the latter cannot avail himself of the confessions of the former," and quotes *Alexander v. Mahon*, 11 Johns. Rep. 185, which decided merely that in an action of trover brought by the plaintiff, who, as sheriff, had taken the goods of one Churchill in execution under a *feri facias*, which the defendant in the action of trover took as a distress for rent, which he claimed to be due to him from Churchill, that the acknowledgments of Churchill of his having become the tenant of the defendant by an agreement which he said was made between them about two months before the seizure, were not admissible in evidence. In the report of this case referred to, it does not appear when the acknowledgments of Churchill so offered to be given in evidence, were made: whether before or after the seizure, does not appear. If made subsequently to the seizure, as we may presume that they were, the decision is perfectly correct. The right of the sheriff, who was the plaintiff, commenced with the seizure of the goods, and to admit the subsequent declarations of the defendant in the execution to be given in evidence to defeat the sheriff's right under the seizure, would be to open a door to let in collusion and false pretenses, got up between defendants in executions and third persons, for the purpose of defrauding and hindering creditors in the collection of their just debts. It is easy to be seen, that if such evidence were admitted to defeat the taking of property in execution by sheriffs it would be difficult to collect debts by execution.

There is also one decision of the Supreme Court of the state of Massachusetts, in *Appleton v. Boyd*, 7 Mass. Rep. 131, where it was not only held that the admissions of the mortgagee, although made before the assignment, could not be given in evidence against the assignee in a suit brought by him to enforce the mortgage against the mortgagor, but that the assignor could not be compelled to give evidence for the defendant against the assignee of the mortgage. Now we have just seen, that the only reason assigned by the court in *Hurd v. West* for rejecting such evidence was because it was secondary, as long as the assignor was a competent witness, and might be examined; but the decision in *Appleton v. Boyd* is also in direct opposition to that principle. I confess that I am unable to discover any established rule of evidence upon which it can be supported. It must be admitted on all hands that the admissions of the mortgagee, before he assigned, would have been good evidence against himself, in case he had brought a suit upon his mortgage against

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the mortgagor; if so, what reason in justice can there be for permitting him by an act of his own, without even the concurrence of the mortgagor, by assigning the mortgage, to set aside the testimony of the mortgagor, which was not only good and admissible in its nature, but amply sufficient to show that the mortgage was paid by him? As well might it be held [*452] *that a witness might render himself incompetent by an act of his own in becoming interested in the cause against the consent of the party producing him, which we know cannot be.

Verbal admissions or declarations by the mortgagee that he has been paid the amount of his mortgage-money by the mortgagor, are evidence that the fact is so; and the very best evidence too, when clearly established to have been deliberately made, because there is every reason derived from universal experience to believe that he would not have so said unless it were true, no more than there is to believe that he would have given a written receipt for it, unless he had actually been paid, or that he would have executed and delivered a formal release without being satisfied in some way. It will surely not be pretended that a receipt or release given and executed by the mortgagee to the mortgagor, before the assignment, would not be admissible in evidence against his assignee; yet they are like verbal acknowledgments or declarations of having been paid or satisfied, that is, merely evidence of it, though as such it must be admitted more certain, and therefore generally entitled to more weight, in the scale of credibility, which however does not affect the question of competency in the least. Can it then be, that where a party has possessed himself, or has within his power, clear and abundant testimony of his having paid a debt, or of his having a good title to property, that he can be deprived of it without his consent by the will and act of him who is adverse in interest? To allow or permit one, by an act of his own, to set aside the testimony of another, who stands in opposition to his interest, would in effect in many cases be, to permit a man to make testimony for himself.

There is also a case between *Duckham v. Wallis*, 5 Esp. Ca. 252, which was tried before Lord Ellenborough, where the defendant, who was sued as the acceptor of a bill offered to give in evidence the acknowledgments of one Evans, who had been the holder of the bill, and had passed it by his indorsement after it became payable, made by him while he held the bill, that it had been discharged and settled in an account between him and the acceptor, but the court decided them to be inadmissible, because the fact, if so, might have been proved by Evans as the court said, and that what Evans had said was not the best evidence;

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that it would be making the declarations of a third person evidence to affect the plaintiff's title when that party is not on record, which was, I humbly conceive, a misapprehension of the nature of the testimony, and a misapplication of the rule that excludes hearsay evidence, and comes in direct collision with the decisions already noticed in the cases of *Ivat v. Finch* and *Walker v. Broadstock*.

It may also be perceived that the reasons given in support of those decisions, which have been made in opposition to the rule, that admissions shall not only be evidence against or binding upon those who made them, but against or upon all those claiming under them, are *not the same, nor yet reconcil- [*453] able with each other in the different cases, which must lessen their authority.

Having noticed the most prominent of the decisions which have fallen in my way, and appear to have been made in violation of the rule for which I contend, I will now refer to a number, in addition to those already mentioned, which sustain the rule very fully.

In the case of *Prather v. Johnson*, 3 Har. & J. 487, the Court of Appeals, the highest tribunal in the state of Maryland, it was decided that either the oral or written declaration of the creditor that the surety had paid to him the amount of the debt, might be given in evidence by the surety against the principal debtor to support an action to recover the same: so in an action of trover for slaves, in which the plaintiff claimed title under a bill of sale from F., the former owner, and the defence was, that F. had afterwards manumitted them, it was held by the same court that the declarations of F. made between the date of the sale and the deed of manumission, "that he had sold the slaves to the person under whom the plaintiff claimed," were competent evidence for the plaintiff. *Coale v. Harrington*, 7 Har. & J. 147. And in the case of *Dorsey v. Dorsey's Heirs*, 3 Har. & J. 426, the same court determined that the declarations of a man respecting his title to lands, made before he parted with his estate therein, were evidence against him, and all claiming under him. See also, *Ricard v. Williams*, 7 Wheaton, 111.

There are also two decisions of the Supreme Court of errors in the state of Connecticut to the same effect, in which all the judges of that court concurred as to the admissibility of the evidence. The first is, *Beers et al. v. Hawley*, 2 Conn. Rep. 467, and the second is *Norton v. Pettibone*, 7 Conn. Rep. 319, in which the question appears to have been pretty fully argued by counsel and to have received from the court a full and deliberate consideration. This last case in its circumstances was not

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unlike the one now before us. The plaintiff and the defendants all claimed title to the land in dispute from Alva Marks who was admitted by both parties at one time to have been the owner of it. The plaintiff claimed title by virtue of the levy of an execution in his favour against Alva Marks made on the 11th of March, 1825. The defendants claimed title, one as the widow and the other as the sole heir at law of Alexander Pettibone, deceased, whose title was by deed from Zachariah Marks, who derived his title by deed from Alva Marks, the debtor in the execution levied as stated. The plaintiff insisted that this deed was made to defraud the creditors of Alva Marks, and therefore void. To support this, he offered to prove by one Frederick Lewis, that Zachariah Marks, after the execution of the deed to him, and after he had taken actual possession of the premises under it, and previous to the deed to Alexander Pettibone, had acknowledged to him, that the deed from Alva Marks to him was without consideration, and made to defraud the creditors of the grantor. The defendants objected to the admission of this evidence, but the judge before whom the cause [*454] was tried *admitted it. Upon motion afterwards for a new trial, by the defendants, against whom a verdict was given, the whole court affirmed the decision of the judge who tried the cause. Mr. Justice Dagget, who is not only considered an able jurist, but a man of great force of mind, delivered the opinion of the court, in which he says, "declarations of a person while in possession of the premises against his title, are always admissible, not only against himself, but against those who claim under him." From the report of this case it does not appear whether Alexander Marks was living and within the jurisdiction of the court, but it is manifest that that was not a circumstance which could have any bearing upon the question, or influence upon their decision of it, for the court say, that such declarations are always, that is, under any circumstances whatsoever, admissible, not only against him who made them, but against all claiming under him.

Mr. Justice Story, who delivered the opinion of the Supreme Court of the United States in *Ricard v. Williams*, 7 Wheat. 111, in speaking of the declarations of a former owner and occupier of the land, the title to which was the matter in dispute says, "his declaration uniformly was, that he had a life estate only, and that upon his death they would descend to his son Joseph. Of the competency of this evidence to explain the nature of his possession and title, no doubt can reasonably be entertained."

In the next place it appears to me that we have a series of decisions of this court upon this question that are conclusive,

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and in which it has been resolved, that such declarations and admissions are evidence, and as such may always be given against the party who made them, or those claiming under him, without regard to the party's being alive or dead, within or without the reach of the process of the court.

In *Andrew's Less. v. Flemming*, 2 Dall. 93, the declarations of the husband of the defendant, under whom she held possession of the land, were given in evidence against her. It is true that the husband at the time of the trial was dead, but that circumstance is not mentioned, or even hinted at by the court as the ground of their decision for admitting the evidence. In *Stricker v. Todd*, 10 Serg. & Rawle, 63, the declaration of a grantor of a mill, and of his son and heir-at-law, that all the water passed, made to those in possession under a subsequent grant of another tract of land, through which the water ran, were adjudged admissible evidence in a suit against one claiming under the latter, for obstructing the water. In the *Less. of Parker v. Gonsalus*, 1 Serg. & Rawle, 526, where the plaintiff read in evidence a title-deed reciting that possession of the land in dispute had been delivered to A. according to contract, he was then permitted by the court, in order to show that A. had no claim to the land, or the possession of it, to give in evidence his declarations that he had sold to another, who had sold to the plaintiff. This was ruled competent evidence without its being shown that A. could not have been produced as a witness. In *Bassler v. Niesly et al.*, 2 Serg. & Rawle, 352, the declarations of the party under whom the defendants claimed *and held the land in dispute, were held admissible evidence against them. It appeared in this case, that the [*455] party whose declarations were given in evidence was dead, but there the late Chief Justice Tilghman, who delivered the opinion of the court, would seem from the reason given for the decision, to exclude by implication strong as possible, all idea of the death of the party forming any ground of it; for he says, "the defendant claimed under Jacob Niesly, therefore Niesly's confessions were evidence against him, as well as against Niesly himself," placing the admission of the declarations entirely and exclusively upon the ground of privity, which is no doubt the true one. In the next case, *Weidman v. Kohr*, a decision to the same effect is expressly placed upon this ground, 4 Serg. & Rawle, 174. The declaration of the person from whom the plaintiff derived his title to the land in dispute, made before he disposed of his right, which arose under a warrant and survey, that his warrant and survey did not cover the bond in dispute, was held to be admissible in evidence against the plaintiff. From the report of the case it does not appear

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whether the party whose declaration was given in evidence was alive or dead, within or without the jurisdiction of the court at the time; but the court say, "there can be no doubt but such declarations are evidence. Nothing is stronger than the confessions of a party interested against himself, and the privity between that party and the plaintiff renders his confessions evidence against the plaintiff." Here it is observable that the court consider this evidence of a primary character, and not secondary, for they say, "nothing is stronger." And for that reason, and on account of the privity that existed, they held it admissible. And in *Kellogg, Assignee, &c., v. Krauser*, 14 Serg. & Rawle, 137, the acknowledgment of the assignor of a judgment bond made a few days before he assigned it, that he had received from the defendant or obligor, three hundred dollars, in consideration of which he had agreed not to enter up judgment upon the bond, was adjudged to be admissible in evidence against the assignee, and from the report of the case there is no reason to believe that the assignor could not have been produced as a witness. It is certain that that does not appear to have been the ground upon which it was decided to be admissible.

The declarations of the supposed grantor in the case of *Bartlet v. Delprat et al.*, 4 Mass. Rep. 702, which has been cited by the counsel for the defendant in error, were made after the date of the deed, and therefore very properly held not admissible. And for the same reason the same court held the declarations of the grantor, in the case of *Clarke v. White*, 12 Mass. Rep. 440-1, inadmissible to defeat his deed.

In support of the decision of the court below in the case before us, the general rule has been invoked, that parol evidence is not to be received to contradict, alter, add to, or diminish a written instrument. I am very willing to admit the existence of this rule, as well as the expediency of it. Indeed, I consider [*456] it a matter of regret that it has *not been more strictly adhered to in this state, than perhaps will be found upon examination of all our decisions on this subject. But then, there are exceptions to the rule as old as it is itself. For instance, when the instrument, through fraud or mistake, has been made different upon its face from what was intended by the parties, parol evidence is admissible to prove such fraud or mistake. *Moore v. Hays*, 1 Johns. Ch. Rep. 343; *Stevens v. Cooper*, Ib. 429; *Walker v. Walker*, 2 Atk. 99; *Ramsbottom v. Gorden*, 1 Ves. & Bea. 165; 1 Fonb. Eq. 169, 170, [200] and note, *Lansatt's Ed.*; *Jones v. Strahan*, 3 Atk. 388-9. So parol evidence has always been received to establish a resulting trust, and the declarations of the grantee, made while invested with the legal estate, have been admitted in evidence to show the trust. *Greg-*

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ory's Less. v. Setter, 1 Dall. 193 ; German v. Gabbard, 3 Binn. 302 ; Wallace v. Duffield, 2 Serg. & Rawle, 521 ; Peebles v. Reading, 8 Serg. & Rawle, 492 ; Wither's Appeal, 14 Serg. & Rawle, 185 ; 1 Johns. Ch. Rep. 582 ; Botsford v. Burr, 2 Johns. Ch. Rep. 409. The declarations of David Johnson which were offered in evidence, went most clearly to show a resulting trust, and were therefore within one of the exceptions at least to the general rule, as also within the exception expressly made in the act of assembly against frauds and perjuries.

The case of M^r Williams v. Martin, 12 Serg. & Rawle, 269, which was cited by the counsel for the defendant in error in argument on this point, does not afford any support, for the declarations of the grantor offered in evidence in that case, did not go to prove either trust or fraud or mistake, but to show that the intention of the grantor was different from what it appeared to be by a legal construction of this deed, and thus to vary the effect and operation of the deed accordingly, which to have admitted would certainly have been in opposition to the general rule. The courts are to expound and to decide upon the legal effect and operation of written instruments ; and although in doing so they are to be governed by what shall appear to have been the intention of the parties so far as consistent with the principles and policy of the law, yet that intention must be collected from the terms of the instrument itself, and not from evidence *aliunde* ; Lowfield v. Stoneham, 2 Stra. 1261 ; Cambridge v. Rous, 8 Ves. 22. Hence the testimony of the party himself to the same effect as his declarations, could not have been admitted, had he been produced as a witness for that purpose in court.

Again it is said, that Stong was a *bona fide* purchaser of the property in dispute, for a valuable consideration, without notice, and that therefore the declarations of David Johnson were rightly rejected, unless the defendants below had at the same time apprized the court of their intention to give further evidence, showing that the plaintiff below had notice at the time that he accepted of the deed of conveyance from David Johnson, that he was only a trustee for Edward Johnson. It may be observed as very certain, from the reason given by the court below for rejecting the evidence, that this *view of the matter, [*457] or objection, did not present itself to them. If it had, and the court had mentioned it, the counsel for the defendants below might perhaps have removed it at once, by informing the court that such was their intention, and that they were fully prepared to do it, but that they must in the natural and necessary course of things give evidence first of the trust, and show that it existed before they could prove notice of it to the plain-

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tiff below. But it appears to me that this objection could not with propriety have been taken, in any case, at such a stage of the proceedings, unless the party offering evidence of a trust with a view to defeat the title of one who claimed to be a *bona fide* purchaser of real estate from the trustee without notice of the trust for a valuable consideration, were to admit that he could give no evidence of notice; without this the court has no right to take it for granted or conceded that no evidence of notice is intended to be given or can be given, for the court may as well found the rejection of the evidence offered to prove the trust upon the one as upon the other. As long as the defendants below continued to give or offer to give evidence of facts or matters relevant to the issue in their natural order, and which evidence was competent to be received in proof of such facts or matters, it would have been error in the court to have arrested their progress. Now as the defendants below claimed the land in dispute under a sale made of it in a due course of law, as the property of Edward Johnson, for the payment of his debts, it became all important for their defence to show that Edward Johnson was the owner of the land either in law or in equity; surely then, as the testimony offered tended to prove this latter state of things, it was relevant, and as to the competency of it, that has been shown already. As to the time again, at which it was offered, it is clear that it could not have been offered at any other; or at least it was necessary to give evidence of the existence of the trust before notice could be proved of it, as it would be impossible to prove notice of that which did not appear to have any being.

But to say that the declarations of David Johnson were offered in evidence to defeat the title of a *bona fide* purchaser without notice, for a valuable consideration, appears to me to be assuming a fact; for I do think that the evidence given and contained in the paper-book, affords very slight, if any, support for it. From this evidence it does not appear that Frederick Stong, the plaintiff below, made any bargain or contract at all with David Johnson, who was invested with the legal title to the property. The only agreement to which he appears to have been a party, was made with Edward Johnson and Samuel Slingluff, who held a mortgage upon one of the lots of ground containing three-quarters of an acre. Slingluff always considered Edward Johnson the owner of the ground, although he had made a conveyance of it to David. When he wanted payment for it, he applied to Edward not David, and from the testimony, Frederick Stong, who was the brother-in-law of Edward, would seem to have made the arrangement with Edward under which he got the title, and

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that *Edward got David to execute the deed of conveyance for the lands in dispute to Frederick Stong. The [*458] whole of this property was purchased by Edward Johnson at three hundred and forty pounds, of which, from the testimony, it appears that Edward paid two hundred and forty pounds, and the remaining one hundred pounds was paid by the hands of Frederick Stong, the plaintiff below ; but from Samuel Slingluff's testimony, there is some reason perhaps to suspect, that this one hundred pounds, or a part of it at least, was money which the father of Frederick Stong, and of Mrs. Edward Johnson, had advanced to her husband, Edward Johnson, as a portion of his estate which he designed for his daughter. David Johnson never paid anything, and never appeared to have made any claim to the land, or any part of it. It appeared to have been occupied from 1811, when it was first purchased by Edward Johnson, until about 1827, when he was turned out of possession by John Brandt, one of the defendants below, who recovered it in an action of ejectment brought by him after he purchased it at the sheriff's sale in November, 1825. Indeed, it appeared pretty fully that David never was considered anything but a trustee. Charity might suppose that he got the deed of conveyance made to himself for the lot bought of Slingluff, containing three-quarters of an acre, to indemnify him against the payment of part of the purchase-money, as he had become Edward's surety to pay it ; but why the deed of conveyance for the five acres bought and paid for by Edward himself from Samuel Ashmead was made to David Johnson also, it is difficult to imagine, unless for the purpose of keeping it from the grasp of Edward's creditors. Edward, as appears from the testimony, paid ninety pounds for this five acres, and one hundred and fifty pounds out of the two hundred and fifty pounds to which the three-quarter acre lot was reduced when Slingluff received the one hundred pounds from the hands of Frederick Stong. It also appeared, in addition to the money paid by Edward for the property, that he had built a barn and a loom-house on the lot bought of Slingluff. Yet an absolute conveyance was made to Frederick Stong for the whole of this property, who never paid more than one hundred pounds at the utmost for it, about one-fourth of what it cost. Yet notwithstanding all this testimony having been given, which it appears to me a jury might very fairly have deemed sufficient to warrant them in deciding that Frederick Stong not only knew that Edward Johnson was the *cestui que use*, and David Johnson a mere trustee, but that there was collusion between Frederick Stong and his brother-in-law Edward Johnson, and David Johnson, in making a deed of conveyance for both the lots of ground to Stong, and that it was done for the

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purpose of keeping it all out of the reach of Edward's creditors. To say the least of it, the arrangement under which Stong claimed was suspicious, and was it for the court under such circumstances to undertake to withdraw the matter of fact from the jury, and to say that Stong was a *bona fide* purchaser of the [*459] property for a valuable consideration without notice, *and therefore they would not admit the declarations of David Johnson in evidence? It appears to me that the rejection of the testimony cannot be supported upon this ground, and that the judgment of the court below ought to be reversed and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Wh. 467; 8 W. 438; 3 W. & S. 375; 7 W. & S. 239; 4 Barr, 409; 7 Barr, 422; 6 Wr. 420; 3 S. 110; 15 S. 325; 16 S. 246; 20 S. 48.

Approved in 2 Barr, 372, and again in 3 Barr, 139.

Cited by the Court, 4 R. 352; 2 Barr, 375; 3 Barr, 199; 4 C. 494.

[PHILADELPHIA, MARCH 30, 1832.]

Case of Maccungie Township.

IN ERROR.

It is no objection to the proceedings of the Court of Quarter Sessions upon a petition praying for the division of a township, that the petition asks for a division according to a line pointed out in the petition absolutely, and does not ask for any inquiry into the propriety of a division; or

That the order of the court authorizes the commissioners appointed by them to inquire into the propriety of making the division according to the prayer of the petitioners, without authorizing them to inquire in any wise, into the propriety of any other division line than that proposed; or

That the commissioners have divided the township according to the division line proposed by the petitioners and have not reported any inquiry or decision as to any other division.

ON a *certiorari* to the Court of Quarter Sessions of *Lehigh* county, the record of that court in the matter of the application for the division of Maccungie township, was returned to this court, where the exceptions filed by the appellants to the proceedings of the court below were argued by

Brooke, for the appellants, and *J. M. Porter*, for the appellees.

Opinions, agreeing with each other, were delivered by Ross, J., and Kennedy, J., in which the circumstances of the case are so fully and minutely stated, that any other report of it would be superfluous.

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ROSS, J.—By the record returned, it appeared that petitions were presented on the 8th day of May, 1828, to the court, signed by two hundred and sixty resident citizens of Maccungie township in said county, setting forth, amongst other things, that the township of Maccungie has long since been erected, and from its extent is inconveniently large for all township purposes: That there are upwards of seven hundred voters in said township, and according to the mode of conducting elections under the present election laws, it is exceedingly inconvenient, if not impossible, for all the voters in said township to *vote at a general election, &c. The petitioners therefore prayed the court to divide the said township according to the following division line, to wit: Beginning at a stone in the line dividing the said township of Maccungie from the township of South Whitehall, on or near the line of land, late of Jacob Shantz, deceased, and thence extending in a straight line south fifty-five degrees and a half west, through meadow land of Jacob Shantz, twenty-nine perches, through cleared land of General Henry Metz, seventeen perches, to the public road leading from Bortz's tavern to Shantz's mill; thence across said road and through land of John Bortz, one hundred and thirty-five perches, through land of Nicholas Litzenberger, eighty-four perches, through land of Michael Bartion, one hundred and eight perches, through land of Charles Lick, deceased, eighteen perches, through woodland of John Hiskey, twelve perches, through land of Michael Hiskey, deceased, one hundred and fifty perches, to the road leading from Allentown and Reading road, to Fogelsville, thence across said land, and land of Michael Bartion, one hundred and seventy perches, through land of George Hiskey, sixty-one perches, through land of David Schall, fifteen perches, to the mail road leading from Allentown to Reading, thence across said road, and through land of David Schall, fifty-three perches, to the road leading from Trexlertown to Eman's, thence across said road, and through land of Philip Hoffner, sixty-one perches, through land of Benjamin Haines, one hundred and ninety-two perches, through land of John Albrecht, thirty-eight perches, to the road leading from Millers-town to Fogelsville, thence across said road and through land of the said John Albrecht, thirty-six perches, thence through land of Henry Mohr, twenty perches to the creek, continuing through said Mohr's land, twenty-eight perches, thence through land of James Smoyer, one hundred and fifty-six perches, through woodland of Jonathan Breinig, fifty-two perches, through land of Henry Romich, twenty-four perches, to the road leading from Millers-town to Breinig's tavern, thence across said road and through land of the said Henry Romich, one hundred and sixty-eight

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perches, through land of George Wolvert, deceased, sixty perches, through land of Peter Butz, one hundred perches, through land of John Butz, sixty-six perches, through land of Jonathan Butz, forty-two perches, through land of Peter Fegely, eighty-two perches, and through land of Christian Fegely, twenty-seven perches, to a post in the line dividing the said township of Maccungie, and the county of Lehigh, from the county of Berks, the whole length of which division line, being two thousand and four perches.

On the presentation of this petition, the court made the following order: "May 8th, 1828. The petition being read the court appoint Jacob Dillinger, Solomon Keck, and Jacob Hartzell, to inquire into the propriety of granting the prayer of the said petition, and if they shall deem it proper and necessary, to divide the said township of Maccungie, then it shall be the duty of the said Jacob Dillinger, Solomon Keck, and Jacob Hartzell, [*461] or any two of them, to make a plot or draft *of the township proposed to be divided, and the division line proposed to be made therein, if the same cannot fully be designated by natural lines or boundaries, all which they, or any two of them, shall report to the next Court of Quarter Sessions, &c., together with their opinion of the same."

September the 2d, 1828, the three men appointed by the court made report, together with their opinion, "that it is proper and necessary to divide the said township according to said division line." The report was read and filed September 2d, 1828, and on the same day remonstrances against the proposed division, signed by two hundred and sixty-three persons were presented against it. On the 18th day of December, the following exceptions to the proceedings were filed.

First. The petition does not set forth any sufficient cause for a division.

Second. The petition asks for a division according to a line pointed out in the petition absolutely, and does not ask for any inquiry into the propriety of a division.

Third. The order authorizes the commissioners only to inquire into the propriety of making the division according to the prayer of the petitioners, and does not authorize them to inquire into the propriety of any other division line than that proposed.

Fourth. That the commissioners did not run any other lines of the township than the division one, and of course could not know the distances on the other lines of the township which they lay down on the draft.

Fifth. That a majority of the inhabitants of the township are opposed to the division, and there is no occasion for the division thereof.

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Sixth. That the line proposed does not divide the parallelogram composing the present township at right angles in equal parts, nor does it in any great degree lessen the distance which most of the inhabitants will have to travel to township elections and meetings.

Seventh. That the commissioners have divided the township according to the division line proposed by the petitioner, and have not reported any inquiries or decision as to any other division.

Eighth. That the draft reported is erroneous, and calculated from its appearance on paper, to give a different view of the township from what it would really exhibit if carefully protracted.

Ninth. That due notice was not given to the inhabitants of the township of Maccungie who were opposed to the division, to enable them to attend and contest the division before the commissioners.

On the 4th day of December, 1828, the report and proceedings were recommitted to the same men, the persons remonstrating against the division objecting thereto.

On the 2d day of February, 1829, the commissioners made the following report :

*“To the Judges of the Court of Quarter Sessions of [462] the peace for the county of Lehigh.

“The commissioners appointed by the court at May sessions, to inquire into the propriety of dividing Maccungie township, to whom was recommitted the report made by them and the proceedings had thereon, report, That due and public notice having been given by advertisements to the supervisors and others of the said township of Maccungie, posted up in all the most public places, they proceeded to examine the line dividing the said township of Maccungie from the township of Weissenburg and Low Hill. They commenced at a post, being a corner between the townships of Maccungie, North Whitehall, South Whitehall, and Low Hill, on land of Jacob Hielman, and ran southwest six hundred and sixty perches to a stump marked for a corner of Weissenburg and Low Hill townships on land of Jonathan Mohr, continuing same course thirteen hundred and twenty perches to the Berks county line on land of Samuel Heck, the whole distance being nineteen hundred and eighty perches : That they have examined an official draft of the adjoining township of Weissenburg, which corresponds in course with the draft annexed to their former report. They are aware that on the state map the line between the said townships of Maccungie and Weissenburg does not appear a straight one, but that must be an error in the draft remaining among the late Mr. Scull’s papers, from which a map of Lehigh county was made for the state map. The line of Maccun-

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gie township along Berks county is twenty-six hundred perches. In the draft annexed to our former report it is twenty-five hundred and sixty perches. Considering how long ago Mr. Scull measured that line, the difference is but small, and evidently the points and corners are the same. Now commence at the Berks county line, and run according to Mr. Scull's draft, you would leave the stump or Weissenburg or Low Hill corner two hundred perches to the left hand, and a district of country sixteen hundred and sixty perches in length and two hundred perches in breadth as belonging to no township, which we cannot believe to be the case. Having also examined drafts of all the other adjoining lands, and from other information and observations, we feel confident that the draft annexed to our former report is correct."

This report was read and held under advisement, and on the 6th day of February, 1829, the following exceptions were filed; and on the 4th of May, 1829, a rule was granted to show cause why the proceedings should not be quashed:

First. That there was error in recommitting the proceedings to the commissioners.

Second. That when the report was recommitted, the commissioners should have proceeded to discharge all the duties enjoined on them by the original order, the recommitment being general, and no notice having been given to the supervisors of the highways of the township of the meeting of the commissioners under the former order.

[*463] **Third.* That the commissioners instead of inquiring and finding as by the act of assembly is enjoined upon them, have merely gone into an argument in support of their former erroneous idea as to what was the correct draft of Maccungie township.

Fourth. That the plot of the township of Maccungie reported by the commissioners with their report is incorrect, as appears by a copy of the draft made by Edward Scull, hereto annexed.

The following errors were assigned.

First. The court erred in quashing the proceedings.

Second. The court erred in considering that the petition was defective inasmuch as it prayed for a division according to a line pointed out by the petitioners.

Third. The court erred in considering the order as erroneous and improper, as directing the commissioners to inquire into the propriety of making the division according to the prayer of the petitioners, and in considering it as necessary that the commissioners should be authorized specially by the order to inquire into the propriety of other division lines.

Fourth. The court erred in considering it as necessary that

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the commissioners should have reported an inquiry and decision as to other division lines, than that reported by them as proper and necessary.

Fifth. The court erred in taking into consideration and deciding upon the exceptions to the original report. The persons opposing the division should have been confined to their exceptions filed to their second report, or report of recommitment.

Sixth. That inasmuch as the decision was necessary to have been made as the commissioners had reported it to be expedient, and as the proceedings are believed to be, in all respects, regular and correct, the court should have confirmed the division as reported.

The Court of Quarter Sessions quashed the proceedings for the 2d, 3d, and 7th exceptions filed, without giving any opinion on the other exceptions. This is a concise view of the whole case. It is more full than those which have been reported, but not more so than seemed necessary to make the case intelligible, especially as it had been once already adjudicated on. On the argument much time was consumed in endeavouring to show a dissimilarity between the laws authorizing the court to appoint viewers to lay out roads, and the law authorizing them to divide townships. The dissimilarity in many respects is so clear that it would be a waste of time to point out the many provisions in the one, that are not found in the other.

It was contended that the words "if necessary," in the act authorizing the court to divide townships, give a discretionary power to the sessions to judge, in the first instance, whether or not a division is necessary, which power is not given by the road law; yet by that law the court are, on application for a view, as "often as they find it needful," required to "appoint six respectable freeholders." The *right to refuse to appoint [*464] the view is as fairly to be inferred from these words, as to refuse to appoint men to divide a township. In practice, I believe, a petition for a view of a road is never rejected: at least I know of no decision to that effect. It is conceded by the counsel for the exceptors, that the court have the power in the first instance to decide that the division of the township is expedient or inexpedient, a concession I am not prepared to sanction, unless the division can be designated by natural boundaries, or other landmarks appearing on the ground. The court have a discretion to lay off townships or divide them, and if they had rejected the application, because in their opinion it was inexpedient, they might have done so. But the court decided the question on a mistaken view of the law, conceiving: 1st. They had no right to appoint men to make a division according to a line pointed out in the petition, abso-

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lutely, and does not ask for any inquiry into the propriety of the division. 2d. That the order authorizes the commissioners to inquire into the propriety of making the division according to the prayer of the petitioners, and does not authorize them to inquire into the propriety of making any other division. 3d. That they have not reported any inquiries or decision as to any other division.

In the case of erecting a separate township out of Wyalusing township, one of the exceptions was, that it did not appear that the commissioners viewed the ground. Chief Justice Tilghman, who delivered the opinion of the court, said, "There is only one objection of any weight in this case, and that is, that the commissioners did not return a draft of the whole township of Wyalusing. There is nothing in the objection of its not appearing that the commissioners viewed the ground. The act does not require that it should appear. But when men return a draft and give their opinion that the division is convenient, we must presume that they had taken the proper means of judging, which could not be done without a view of the country." 2 Serg. & Rawle, 402. In the case now under consideration, a draft of the whole township was returned, together with the opinion of the commissioners that it was proper and necessary to divide the said township. When this case was before the court formerly, reported in 14 Serg. & Rawle, 67, the proceedings were reversed, because it did not appear that the commissioners had made any inquiry into the expediency of granting the prayer of the petition. They were appointed to make a plot or draft, they did so. The last case therefore only decided that it is necessary it should appear the men inquired into the expediency of granting the prayer of the petition. These two cases, and the opinions already expressed, are decisive of the questions made in this cause. There is no weight in the third point, or seventh exception. From the drafts returned, it is to be presumed the inquiries were made; sufficient latitude was given by the order appointing the men, to wit, "that they, or any two of them, should make a plot or draft of the township proposed to be divided, and the division line proposed to be made therein, if the same cannot be [*465] fully *designated by natural lines or boundaries," all which it appears has been done. I can see no objection to confining the division to the line designated by the petition. If the petitioners ask for a particular specified division, why should they have imposed on them a totally distinct and different division? Why if they ask for bread, should they be obliged to accept of a stone? Upon the whole view of the case the court fell into an error in supposing they had no right to make an

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order for a division according to a line pointed out in the petition. The proceedings must be reversed.

KENNEDY, J.—A petition signed by two hundred and sixty of the inhabitants of Maccungie township was presented in this case to the Court of Quarter Sessions of Lehigh county, setting forth various inconveniences under which they laboured, on account of the great extent of the territory of the township, and therefore prayed a division of it, according to a line therein designated; upon which the court appointed three impartial men, to inquire into the propriety of granting the prayer of the petitioners. These men afterwards made a report in favour of the division of the township according to the line proposed in the petition as being necessary to suit the convenience of the inhabitants of the township. This line they described by certain monuments, courses, and distances. Nine exceptions were taken and filed against this report; and the court on the 6th of May, 1829, quashed the proceedings for the second, third, and seventh exceptions, which are as follows, viz.:

Second. "The petition asks for a division according to a line pointed out in the petition absolutely, and does not ask for any inquiry into the propriety of a division.

Third. "The order authorizes the commissioners only to inquire into the propriety of making the division according to the prayer of the petitioners, and does not authorize them to inquire in any wise into the propriety of any other division line than that proposed."

Seventh. "That the commissioners have divided the township according to the division line proposed by the petitioners, and have not reported any inquiry or decision as to any other division."

This proceeding is founded upon an act of assembly, passed the 24th of March, 1803, 4 Smith's L. 30-1; Purd. Dig. 433, which directs, "that the several courts of Quarter Sessions of the peace, of the commonwealth of Pennsylvania in their respective counties, shall, from and after the passing of the act, have authority, upon application by petition to them made, to erect new townships, to divide any township already erected, or to alter the lines of any two or more adjoining townships, so as to suit the convenience of the inhabitants thereof, and the said several courts in their respective counties upon application, so as aforesaid made to them, are thereby authorized and required to appoint three impartial men, if necessary, to inquire into the propriety of granting the prayer of the petition, and it shall be the duty of the said men so ap-

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[*466] pointed, or any two of them, to make a plot or draft of *the township proposed to be divided, and the division line proposed to be made therein, or of the township proposed to be laid off, or of the lines proposed to be altered of any two or more adjoining townships, as the case may be, if the same cannot be fully designated by natural boundaries, all which they, or any two of them, shall report to the next Court of Quarter Sessions, together with their opinion of the same, and at the court after that to which the report shall be made, the court shall confirm or set aside the same, as to them shall appear just and reasonable.

The first exception for which the proceedings were quashed, by the Court of Quarter Sessions, is to the form of the petition, because it does not ask for an inquiry into the propriety of the division prayed for. This exception does not appear to be well founded, for the petition not only solicits a division of the township, but sets forth the reasons for doing so, which of necessity demanded of the court an inquiry into the propriety of granting the prayer contained in the petition. The mode or means by which the court shall make this inquiry, was not necessary to be inserted in the petition, because the act of assembly itself points out this, and from its terms would seem to leave it discretionary with the court, whether they shall appoint three impartial men or not, for the purpose of aiding in this particular. By the express words of the act, the court is only authorized and required upon application by petition for the division of a township to appoint three impartial men "if necessary," and of this necessity the court is to judge according to its discretion.

The second exception upon which the court founded their order to quash the proceedings, was to the previous order made by it, appointing the three men, and directing the inquiry which they were to make, which confined them to the propriety of dividing the township, according to the line of division, as set forth and prayed for in the petition, and did not authorize them to inquire into the propriety of dividing it by any other line.

It is agreed that the court had no power to restrict the commissioners appointed by them in their inquiries, to the line of division proposed in the petition; and it has been likened to a petition for laying out a public highway and the appointment of viewers thereon, where it is alleged that although the *termini* of the road prayed for must be set out in the petition, yet if the route and intermediate points, be also designated, and the viewers appointed be restrained by the order of the court appointing them, to the route and courses set forth in the petition

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in laying out the road, if they should be of opinion that a public highway was necessary and wanting between the *termini* mentioned in the petition, the whole proceeding would be irregular and ought to be quashed. Admitting all this, as it regards the viewing and laying out of a public highway, to be correct, it will be difficult, I apprehend, to apply the reason of it to an application for the division of a township. In the first place, it may be observed, that public highways are only to be laid out and established *for the convenience and benefit of the public at large; [*467] and if it be adjudged proper and necessary that a highway should be laid out between any two given points, the interest of the public demands, and can only be consulted by adopting, in laying out the road, the shortest and best practicable route between these points, of which the viewers are to judge. To permit the petitioners, who are at most but a small part of the public, and who have frequently some private interests to be promoted by laying out the road, to designate and direct in their petition the whole route of it, would be to defeat the public interests in many instances at least, which is the great object in laying out public roads. The only consideration that is permitted to interfere with this principle, is, the unnecessary and useless sacrifice of private property and improvements, which is to be avoided. All these considerations are to operate in settling and determining upon the route of the road, and makes it highly proper that the viewers and the court should be left at full liberty to exercise their judgments in regard to them.

In the next place it must be considered that by our act of assembly which prescribes the mode and gives the authority for laying out roads, that the Courts of Quarter Sessions cannot dispense with the appointment of viewers. They must appoint them; and these viewers are to be appointed, as well for the purpose of determining upon the particular course of the road, as upon its necessity; and in deciding upon the ground or course where the road shall be laid out and established, they must be left at full liberty and discretion in doing so, to decide according to their judgment of what the public interest, having a proper regard for the private improvements and rights of individuals, would seem to require.

Now it is obvious that the public have little if any concern or interest in the division of a township. According to the very terms of the act of assembly already recited on this subject, it will be seen that it is only to be done for the convenience of the inhabitants of the township, and upon their application by petition. It is only then, in those cases where the inhabitants of a

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township think their convenience requires a division of the township, that the Courts of Quarter Sessions are authorized to act at all. This matter of convenience is a thing of which the inhabitants of the township are to judge in the first place, and no division of the township can be made in opposition to their wishes and judgment in this particular. The Courts of Quarter Sessions would seem to have merely the power of inquiring in such cases into the reasonableness and propriety of the wishes of the applicants as expressed in their petition; and whether the division prayed for was in conformity to the wishes of the inhabitants generally of the township or not; and if necessary, to appoint three impartial men, to aid in ascertaining all these matters; and finally, to grant or to reject the prayer of the petition. If then, the inhabitants of the township have the right, and must exercise it in the first place, of deciding whether [468] their convenience requires a division of *their township or not, as it must be admitted, I think, that they have, it follows that they have the right to decide where the line of division shall be, if a division be made at all; because whether their convenience shall in any degree be promoted by a division of the township, may depend, in their opinion, entirely, or at least mainly, upon where the line of division shall be fixed. They have a right then, as it appears to me, to propose in their petition to the court, a line of division, and indeed such are almost the very words of the act of assembly, and to say to the court that their convenience will be promoted by making a division of the township according to the line so proposed; but if it cannot, or be not made in conformity thereto, that they do not desire any division to be made. The third exception, therefore, taken in the court below, furnished no ground whatever for quashing the proceedings.

The insufficiency of the remaining reason for the court below quashing the proceedings which is contained in the seventh exception there taken, has been fully established by what has been said upon the second ground; for if the order of the court below in appointing the commissioners was correct, as has been shown it was, the report of these commissioners, which forms the subject of this seventh exception, and which is in every respect a full and complete response to the order of the court under which they acted, must also be free from error. The order of the Court of Quarter Sessions quashing the proceedings in this case is reversed, and the record thereof remanded with direction to the said court to proceed therein as is further required by law.

Proceedings of the Court of Quarter Sessions reversed.

Cited by Counsel, 1 Barr, 100; 9 N. 357.

*[PHILADELPHIA, MARCH 30, 1832.]

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Kimball who Survived Tyson *against* Kimball.

APPEAL.

A. & B. brought an action of *assumpsit* against C., in which they declared upon an alleged agreement, that the said C., in consideration that they would enter satisfaction on two judgments which they held against him as administrators of D., for the purpose of enabling him to make a perfect title to one E. for a lot of land which C. had sold to him and which was bound by those judgments, promised to give to A. and B. a new judgment for the aggregate amount of the two judgments on which they at his request had agreed to enter satisfaction; averring, that confiding in the said promise, they did enter satisfaction, &c. Before the trial of the cause took place, A. died and his son was offered as a witness to prove the agreement after having executed to a third person, an assignment of all his interest in the suit and the money for the recovery of which it was brought, and offered to pay into court all the costs which had accrued and a sum sufficient to cover all which might thereafter accrue; Held that he was incompetent on the ground of interest, notwithstanding the assignment, &c., because in the event of the plaintiff's failure to recover in this suit, the estate of the witness's father A., of which he was entitled to a distributive share, would be liable to make good to those interested in the estate of D., of which he was one of the administrators, his proportion of the amount of the two judgments upon which satisfaction had been entered.

APPEAL from the decision of the Chief Justice holding a circuit court in *Montgomery* county in March, 1832.

After argument by *Rawle, Jr.*, for the appellant, and by *Kittera* for the appellees, the opinion of the court, in which the case is fully stated, was delivered by

KENNEDY, J.—This was an action of *assumpsit* brought by Jonathan Kimball and Peter Tyson, (who died after the commencement, and before trial of the suit,) to recover the amount of two judgments which had been entered in the Court of Common Pleas of *Montgomery* county, in favour of Jonathan Kimball and Peter Tyson, the plaintiffs in this action, against Josiah Kimball, the defendant, upon judgment bonds given by him to the plaintiffs, each for the sum of eight thousand five hundred and fifty-four dollars and twenty-eight cents, conditioned for the payment of one-half that sum.

The declaration set forth, that the defendant after having sold ten acres of land, part of his real estate, which was bound by the judgments, to a certain Jonathan Shaw, and having agreed to make Shaw a title for the ten acres, clear of incumbrances, applied to the plaintiffs in the judgments and requested them to enter satisfaction upon the judgments, that he might be enabled to comply with his contract, in making a title to Shaw, and at

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the same time promised the plaintiffs, that if they would enter satisfaction upon the judgments, he would give a new judgment to the plaintiffs in the Court of Common Pleas of Montgomery [*470] county, for the aggregate *amount of those upon which he requested satisfaction to be entered: That the plaintiffs, confiding in the promise of the defendant, and at his request, did enter satisfaction upon the judgments; but the defendant afterwards refused to give or to confess a new judgment to them, to secure the payment of the amount of money for which the satisfied judgments had been entered, and which was justly due upon them at the time satisfaction was entered, according to his promise and undertaking in this behalf.

Upon the trial of the cause, it appeared that the plaintiffs, Jonathan Kimball, and Peter Tyson who was married to the sister of Jonathan Kimball, had been the administrators of William Kimball deceased, the father of Jonathan Kimball, the plaintiff, and of Josiah Kimball, the defendant, and that the bonds upon which the two judgments were entered up in their favour, against the defendant Josiah Kimball had been given to them, partly for their own use, and partly in trust for the use and benefit of the other children of the said William Kimball; and that the satisfaction entered upon the judgments had been done without the consent, and without consulting these other children. It did not appear that these other children had been paid or satisfied, in any way, for the amount of their interest in these judgments by Jonathan Kimball and Peter Tyson, or either of them. On the part of the plaintiff, William Tyson, one of the children of Peter Tyson, who was one of the plaintiffs in the judgments, and one of the plaintiffs in this action, at its commencement, and for some time afterwards, until he died intestate, leaving an estate which passed and descended to his children, was offered as a witness after having executed an assignment under his hand and seal, to a certain John Keck, in consideration of ten dollars paid to him by Keck, of all his right, claim, interest, and demand in the moneys for the recovery of which this suit was brought, as also all his right and interest in the same; and the plaintiffs offering at the same time to pay into court all the costs which had accrued in the suit, and a sum sufficient to pay and cover all that might thereafter accrue. The defendant objected to the competency of William Tyson, so offered as a witness, on the score of his being interested in sustaining and promoting a recovery in this suit. The Chief Justice thought so, and refused to admit him. From this decision an appeal has been taken to this court.

The decision of the Circuit Court upon this point, we think was right. William Tyson, who was offered as a witness on

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behalf of the plaintiffs, had merely transferred and assigned such proportion of the money, which might be recovered in this action, as would be coming to him as one of the children and heirs of his father; but it is manifest that he was interested in a recovery being had beyond this; for he could have no claim to the money or to any portion of it, recovered in this suit, until all the other children of William Kimball deceased, beside Jonathan Kimball, were satisfied and paid their respective proportions of it; and in case of a failure to recover in this action, he would not only lose his claim to that portion of the surplus *which might have been coming to him as one of the children of Peter Tyson, his father, after satisfy- [*471] ing Jonathan Kimball and the other children of William Kimball deceased, but his father Peter Tyson's estate would be liable, in conjunction with Jonathan Kimball, to make good to the other children of William Kimball deceased, their respective proportions of the amount of the two judgments in which they stand as trustees for these other children, and for which they had made themselves chargeable, by having entered satisfaction upon the judgments and thereby destroyed the security which they had for the payment of this trust money, without having received it, and without the consent of the *cestui que trusts*. The manner in which Jonathan Kimball and Peter Tyson have alleged that they entered satisfaction upon these judgments, was clearly a breach of their trust, and such an act as made them liable to pay out of their own pockets, whatever of the amount thereof should be thereby lost, and was held in trust; so that Peter Tyson's estate would and must be reserved just so much as his proportion, that is, one-half of whatever the trust money was equal to, in case of a failure to recover in this action, which must necessarily affect and reduce the sum that would be coming to William Tyson as his purpart of his father's estate, exclusive of what might be added to it by a recovery here, and the assignment which he had made was only of his interest in this action and his right to claim any portion of the money which might be recovered in it, retaining his interest in the other estate of his father. William Tyson, the person offered by the plaintiff as a witness, was thus directly interested in promoting a recovery in this action, notwithstanding his assignment, because it would go in relief of, and prevent a diminution of the residue of his father's estate, which otherwise must inevitably take place, and of course diminish his distributive share of it. This case has no analogy to the case of a creditor, who is a competent witness, generally, to prove a debt due to his creditor, notwithstanding the recovery of it may enable the debtor to pay the witness his debt, because every debtor is presumed to be of sufficient ability to pay his debts, inde-

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pendent of the debt or claim in controversy, until the contrary shall be shown; and therefore the creditor cannot be supposed to have any immediate interest in his debtor's recovery, as he will get his debt at all events.

Neither has the case of *Patton v. Ash*, 7 Serg. & Rawle, 116, which has been referred to, and mentioned also by the counsel for the appellant; or if it has, it is rather against him, for the court seem to insinuate that if it had been suggested there that the administrator, who was a party on the record to the suit, had committed a *devastavit* he would not have been a competent witness, although he had released all claims to any possible benefit which he might derive from a recovery in it. Now it appears in the case before us, that a *devastavit* was committed which must diminish the amount of the estate out of which the person offered as a witness claims to have his equal distributive share, unless there shall be a recovery in this action.

[*472] *The case of *Baynton v. Turner*, 13 Mass. Rep. 391, has also been quoted and relied on by the appellant's counsel, where a son and one of the heirs of the plaintiff's intestate, after having assigned and released to the plaintiff all his proportion and benefit of the money which might be recovered in the suit, and having received from the plaintiff a deed executed by her to him, indemnifying him from all costs and charges to which he might be liable in consequence of the suit, was offered by the plaintiff as a witness upon her part, and after objection by the defendant was held to be competent by the court. We also think that that case is very different from the one now before this court, because it did not appear in that case as it does in this, that a recovery by the plaintiff would go to relieve the estate of the intestate in which the witness was still interested, from a charge that must otherwise inevitably fall upon it and reduce his share.

Judgment of the Circuit Court affirmed.

[PHILADELPHIA, MARCH 30, 1832.]

Craig against Craig.

IN ERROR.

The mere possession of a bond by one of several co-obligors, is no evidence that he has paid the whole debt.

Therefore, in an action by one co-obligor who alleged that he had paid the whole debt, against the other for contribution, where the joint liability of the plaintiff and defendant was admitted, it was held to be error to permit the

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bond to be given in evidence by the plaintiff to prove that he had paid the whole debt.

The declarations of a third person, as to a disputed fact, made in the presence of both parties, is evidence, though not conclusive, against a party who has consented to submit the fact to his decision; even where such third person is capable of being examined as a witness.

THIS case came before the court on a writ of error to the Court of Common Pleas of *Northampton* county.

From the record, which was returned with three bills of exceptions to the opinion of the court below on points of evidence, it appeared, that Charles Craig, the defendant in error, brought this action of *assumpsit* against his brother, Thomas Craig, Jr., the plaintiff in error, to recover the proportion alleged to be due from him of two bonds, in which they were jointly bound to their father, General Thomas Craig, the whole of which Charles alleged he had paid.

On the trial in the Court of Common Pleas, the plaintiff, after having proved the execution of the bonds, and the handwriting of the *obligee to certain indorsements on them, offered in evidence both the bonds and the indorsements, for the [*473] purpose of proving the original liability of the plaintiff and defendant as co-obligors, and that he, the plaintiff, had discharged the debt. Their admission was objected to by the defendant's counsel, because in that stage of the cause the bonds were not evidence to prove any other fact than the joint liability of the plaintiff and defendant to the obligee, which was admitted, and because the indorsements were not as good evidence as the oath of the obligee who ought to have been produced. The court rejected the indorsements, but admitted the bonds in evidence, because their execution had been proved; adding, that "the circumstance of their having been delivered up to the plaintiff should have its proper weight in the decision of the cause." The opinion of the court on this point, formed the subject of the first bill of exceptions.

In the course of the trial, the plaintiff called as a witness Jacob Stem, who testified that he and two other persons were chosen by Charles Craig and Thomas Craig, Jr., to settle the matters in dispute between them. The referees met at the house of Charles Craig at the Lehigh Water-gap, on the 23d December, 1823, when the plaintiff and defendant and General Thomas Craig attended. Charles produced two or three bonds which were not then due, and Thomas objected to having anything to do with them. He said he was not willing to pay anything on these bonds as Charles had not given anything for them. General Craig then said, that he was satisfied, or that Charles had satisfied him for these bonds. The referees did not take into

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consideration any bonds that were not then due, and they were handed back to Charles. By the consent of the parties General Craig was examined before the referees without oath. On his cross-examination the witness said, that he was sure the word used by General Craig was "satisfied;" he said nothing about payment.

Dr. John Boyd, who was also examined as a witness on the part of the plaintiff, stated, that in the course of the summer of 1828 he called on Thomas Craig, Jr., to endeavour to settle the dispute between him and his brother Charles. Thomas said he was not willing to pay Charles for these bonds, because he had never paid his father anything for them; and added, in substance, that he was willing to leave it to his father's decision. The witness went on to state, that sometime after, a meeting took place at Allentown between General Craig, his two sons, Frederick Hyneman and the witness, for the purpose of settling the dispute relative to the bonds, when General Craig acknowledged unhesitatingly, that he had received full payment from his son Charles of the bonds payable 1st May, 1824. Here the counsel for the defendant interposed, and objected to evidence being given of any declarations by General Craig on this occasion, or of any part of the transaction except so far as it consisted of the acts and declarations of Thomas Craig, Jr. The court, after argument, decided, that inasmuch as Thomas Craig, Jr., had declared to the witness that he was willing to leave the [474] matter to his father's decision, and inasmuch *as the transaction proposed to be given in evidence, was a general conversation, at which the defendant was present, and in which he participated, they would permit the whole of the transaction, so long as Charles Craig, Jr., was present, to go to the jury. This decision was the basis of the second bill of exceptions.

The witness then proceeded to state, that Charles Craig produced a number of documents to show that he had paid his father for the other two bonds. Charles alleged that he had at one time paid one hundred and eighty-five dollars, for which he produced a receipt: That he had given his father his note dated 4th of November, 1823, for two hundred and fifteen dollars, which he had paid off at different times. That Mrs. Greenleaf paid General Craig ninety dollars for rails sent down the river by Charles Craig, to be disposed of, towards the payment of the bonds. That he had sent his father, at one time twenty-five dollars by Jacob Bussell, and had given Mrs. Kramer, the general's daughter, with whom he resided, forty-five dollars, also on account of the bonds. General Craig, the witness stated, assented to these payments. Thomas grumbled a good deal and asked his brother Charles where he got all the money to make

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these payments. Charles said he could tell him if it was necessary and mentioned having received money from different places which the witness did not recollect. Thomas said he would never pay a cent of these bonds; he had paid his father long ago and had his receipts for the payment. The general said he was very sorry any dispute had arisen between his sons, and if he had the money he would pay Charles himself. Charles said he had laid out thirty-five dollars for his father in his quarrels with Charles Hutter, to which the general assented; he said nothing, and, the witness added, silence gives consent. General Craig, he said, acknowledged unhesitatingly that he had received full payment for the bond of 1824, and that the referees had nothing to do with the bonds of 1826 and 1827, and the payments before mentioned applied to them. The witness then exhibited a paper showing the conclusion to which they came and the report they made on the subject.

On his cross-examination he stated, that Charles was not present when Thomas agreed to be bound by the decision of his father: That Charles had not expressly authorized him to make an agreement with Thomas to that effect, but he had told Charles he would call on Thomas and try to settle the matter; he interfered solely as a friend. He did not recollect that General Craig denied the assertion of Thomas that he had paid more than he had ever received on these bonds. The witness added, that they took into consideration the bond of 1827 for two hundred dollars. Charles applied the items referred to, to the bonds of 1826 and 1827. On being re-examined he stated, that Charles Craig said, when he called upon him, he would be very glad, if the witness would undertake to settle the matter between him and Thomas.

The third bill of exceptions, which was also taken by the defendant's *counsel, was to the admission by the court [*475] below, of the deposition of Frederick Hyneman, who swore, that at the request of General Craig he proposed to Charles Craig a reference of the dispute said to exist between him and his son Charles, relative to the consideration paid to him for certain bonds, given by Charles and Thomas Craig, Jr., to their father. Charles agreed to the reference, and the deponent and Dr. John Boyd were appointed referees. The parties and referees met, but adjourned to obtain the attendance of Thomas Craig, Jr. After Charles was gone, on the day of the first meeting the deponent saw Thomas Craig, Jr., who informed him, that if General Craig would say, that he had received the amount of the bonds of Charles, he, Thomas, was ready and willing to pay his share. The deponent subsequently sent Thomas Craig, Jr., notice of the time and place of the

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second meeting. He appeared according to the notice. General Craig, Thomas Craig, Jr., Charles Craig, Dr. Boyd, and the deponent met at General Craig's room at Mr. Kramer's, where the referees examined the accounts and vouchers. The brothers disagreed. General Craig after examining the papers and vouchers admitted the indorsements on the bonds to be in his handwriting. The bond payable 1st of May, 1824, he at once gave up and said he was satisfied as to that bond being paid. The only difference between Charles and him was as to the bonds payable in 1826 and 1827. He acknowledged he had given up the bonds to Charles, but disagreed as to the time and place: General Craig said his memory was bad. That the indorsements were in his handwriting. That he remembered several sums of money he had got of Charles, especially ninety dollars which he received through Mrs. Greenleaf and some money through Mrs. Kramer. Thomas then said he had paid money also. This the General did not remember. Thomas said he had receipts, which the General asked him to produce. He said they were at Easton. When the amounts were stated, for which Thomas said he had receipts, the General laughed and said he had never received it; he never had so much money. Thomas became angry and left the referees, who made out and signed an award which was read to General Craig. He expressed himself satisfied with it, and said, that when he got his money from the United States he would sooner pay it himself than go to court.

On the return of the record to this court, the following errors were assigned in the opinion of the court below.

First. It was error, after rejecting the indorsements on the bonds, to permit the bonds themselves to go to the jury.

Second. It was error to decide, in that stage of the trial that the circumstances of the bonds being delivered up to the plaintiff below "should have its proper weight in the decision of the cause."

Third. It was error to admit the testimony of John Boyd and Jacob Stem and the deposition of Frederick Hyneman as to General Craig's declarations, though they were made in the presence of Thomas Craig, Jr.

[*476] **Fourth.* It was error to admit any other evidence of the payment of money or making satisfaction for the bonds by Charles Craig to General Craig, than the testimony of General Craig himself, as it does not appear that his attendance could not have been procured.

Jones and Rawle for the plaintiff in error.

1. If the plaintiff below had really paid to the obligee the

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amount originally due from the defendant and himself, the best evidence of that fact was the oath of the obligee who received the money and who therefore ought to have been produced. His receipts upon the bonds were clearly inadmissible. The fact for which alone the bonds were legitimate evidence, namely, the joint liability of the plaintiff and defendant to the obligee, being admitted, the court ought not to have permitted the bonds themselves to go to the jury, as the effect of doing so was to put them in possession of what had been decided not to be evidence. As sealed instruments, they must, if they are in evidence, be taken out by the jury, and thus not only the bonds themselves, but the receipts indorsed upon them are indirectly made evidence. It is true, as a general rule, that a party may give his evidence, according to his own discretion, and cannot be prevented from doing so by an admission of the opposite party. But this rule, like every other, has reasonable limits. When it is evident that the object of the party offering the evidence is to introduce covertly something beyond that for which it purports to be offered, the court will interpose and prevent him from doing indirectly what they had refused him permission to do directly. *Cutbush v. Gilbert*, 4 Serg. & Rawle, 551; *Jordan v. Wilkins*, 3 Wash. C. C. R. 110; *Longenecker v. Hyde*, 6 Binn. 1; *Lessee of Cluggage v. Swan*, 4 Binn. 154; *Sluby v. Champlin*, 4 John. R. 461; 15 John. R. 493.

2. To say, in the stage of the cause in which it was said, that the circumstance of the bonds being delivered up, should have its proper weight in the decision of the cause, was erroneous. Nothing had been proved but the bare, unexplained possession of the bonds by the plaintiff. How he came by them, did not appear. The court used the phrase "delivered up," but there was nothing in the evidence to warrant the use of such language. But even if they had been "delivered up," that would furnish no right of action against the defendant unless they were delivered up to the plaintiff on his payment of money, on account of the defendant, of which there was not the slightest evidence. They might have been delivered up by the father as a gift to his sons; or Charles may have given new bonds in lieu of them, in neither of which cases could Charles maintain an action against his brother for contribution. *Morrison v. Berke*, 7 Serg. & Rawle, 238; *Doebler v. Fisher*, 14 Serg. & Rawle, 180. Or Thomas may have previously paid his proportion, and on the balance being paid by Charles, the bonds may have been delivered to him. Mere possession then, would prove nothing, and they were consequently irrelevant, except for the purpose of proving a fact which was admitted. *If they were not relevant when they were offered, it was no

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reason for admitting them, that they might afterwards become so by the production of other evidence. *Weidler v. The Farmers' Bank of Lancaster County*, 11 Serg. & Rawle, 134. The issue trying was not whether Thomas was liable as a co-obligor, for that was conceded, but whether Charles had paid the amount of the bonds to the obligee. In saying, therefore, that the possession of them by the plaintiff should have its proper weight in the decision of the cause, the court, in effect said, that it should have some weight in proving the fact of payment; and to say it should have any weight was error.

3. The declarations of General Craig were not evidence, though Thomas was present. What one party says in the presence and hearing of the other, is evidence; but not what is said by a stranger, unless the party to be affected by it, expressly admits that it is true. Silence amounts to nothing. The supposed agreement of Thomas to be bound by whatever his father should decide, does not vary the question. To give effect to the alleged agreement, two things must be proved: 1st. That both Thomas and Charles agreed to be bound by their father's decision; and 2d. That their father did decide. The evidence shows clearly, that even if Thomas did agree that what his father should say, should decide the controversy, Charles never came to any such agreement, and it would be a violation of one of the plainest dictates of justice, that Thomas was bound and Charles loose. In all the cases in which the decision of a third person has been held binding, it was by the agreement of both parties. Now, if General Craig had said that Charles had not paid him, this would not have prevented him from suing Thomas, and proving *aliunde*, that he had paid the bonds. If Boyd's testimony is to be taken, the general did not decide the question. He was merely silent. Besides, the reference was between the general and Charles, to which Thomas was not a party. There was then no suit pending between the brothers. What was said therefore by Thomas was a mere off-hand flourish, not intended to be binding as an agreement. According to Hyneman's testimony, Thomas said, that if the general would say that he had received the amount of the bonds from Charles, he, Thomas, would pay his share; and this the general never did say.

Brooke and J. M. Porter for the defendant in error.

1. The action was for contribution between joint debtors, and the plaintiff's first step in the cause was to show their joint indebtedness. He had proved the execution of the bonds and they were proper evidence, not only to show the joint liability, but to ascertain the amount to be recovered. For these purposes it cannot be denied that they were evidence, and if they were evi-

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dence for any purpose, they were rightly admitted. *Moore v. Houston*, 3 Serg. & Rawle, 175. The admission of the fact which the evidence tended to prove, was no reason why it should not go to the jury. The plaintiff had a right to conduct his cause as he pleased, and it could not be taken out of [*478] his hands by an admission on the part of the defendant. It is for the parties according to their own discretion, to produce such evidence as the circumstances of the case may supply. 1 Stark. Ev. 398; *Crotzer v. Russell*, 9 Serg. & Rawle, 81. But the defendant's idea that the bonds were not evidence to show any other fact than the joint liability of the plaintiff and defendant, was incorrect. It is conceded on the part of the defendant in error, that he could not maintain his action without proof of the payment of money for the defendant below; but direct and positive proof of such payment, by one who witnessed it, was not necessary. There is a manifest difference between the subject-matter to be proved, and the character of the proof by which it is to be established. Facts which raise a presumption of payment are sufficient until contradicted, and no stronger evidence can be given to raise such a presumption, than the possession of the bonds by the plaintiff below, which was *prima facie* evidence that he had discharged them. The authorities in support of this position are numerous. *Tuttle v. Mayo*, 7 John. 133; *Schee v. Hassinger*, 2 Binn. 331; *Poth. Ev.* 472 (806); *Weidner v. Schweigart*, 9 Serg. & Rawle, 385; *Zeigler v. Gray*, 12 Serg. & Rawle, 42; *Rowson v. Adams*, 17 John. R. 130; *Lonsdale v. Brown*, 3 Wash. C. C. R. 404; *Sluby v. Champlin*, 4 John. R. 461.

2. The remark of the court below, that the circumstance of the bonds being delivered up to the plaintiff, should have its proper weight, was a mere incidental observation, which could not affect the propriety of their decision of the point before them, if the evidence was properly received independently of it. But there was nothing objectionable in the remark itself. It was merely that the circumstance referred to should have as much weight as it was entitled to, and no more, to which it is impossible to impute error.

3 and 4. The declarations of General Craig, under the circumstances attending them, were clearly evidence. It was not necessary for the plaintiff below to produce him. He had made out a *prima facie* case without his evidence, and if the defendant supposed he could rebut that *prima facie* case by the production of the obligee, it was his business to produce him. A very strong *prima facie* case, to say the least of it, was proved by conversations, in relation to the subject-matter in dispute, at which both parties were present, and in which both participated. The effect

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of this evidence it was the province of the jury to decide. *Morris's Les. v. Vanderen*, 1 Dall. 65; *Marshall v. Sheridan*, 10 Serg. & Rawle, 268; 2 Stark. Ev. 37; *Vincent v. Huff*, 8 Serg. & Rawle, 380; *Sigfried v. Levan*, 6 Serg. & Rawle, 308; *Craig v. Brown*, 1 Peters, C. C. R. 171. But there is another feature in the case which emphatically makes what passed on the occasion referred to, evidence against Thomas. He had distinctly declared, that if his father would say he had received the amount of the bonds from Charles, he was ready and willing to pay his share. The plaintiff below proposed to show that his father did [*479] say he had received the amount of the bonds from *Charles, and that the declaration was made in the presence of Thomas. It is true, that a party has a right to insist that all the evidence to be adduced against him shall be under the sanction of a judicial oath, but he may waive that right and agree to other and inferior modes of proof; and if he does so, the law will hold him to his agreement. Thus, where a party agrees to be bound by the oath of the opposite party or of a third person, the agreement is obligatory upon him. *Brookes v. Bale*, 18 John. R. 337; *Delesline v. Greenland*, 1 Bay, 458. It is true that in these two cases there was an oath, but the oath possessed no greater sanctity than a simple declaration, for it was extra-judicial. These cases go upon the ground, that the party has, by his agreement, waived all other proof. So where a party refers to another for an answer on a particular subject, the answer is in general evidence against him, because he makes the party referred to, his agent for the purpose of giving the answer. 2 Stark. Ev. 42, 43; 1 Camp. 364, 366; 6 Esp. 74. It is no answer to this argument to say, that General Craig might have been examined under oath. It was not necessary. The plaintiff gave all the proof which the defendant agreed to be bound by, and that was enough.

The opinion of the court was delivered by

GIBSON, C. J.—That the production of the debtor's own bond is evidence of satisfaction, cannot be controverted, because his possession of it is consistent with no other presumption. And it is evidence of satisfaction by the debtor himself, because in the usual course of transactions men pay no debts but their own. All this is strictly predicable of a security payable by but one. But the production of a bond by one of several obligors is no evidence that he has paid the whole, because being incapable of manual possession by all, the custody of it by any one in particular is either accidental or dependent on a variety of circumstances. In some cases it may possibly be committed to the particular obligor who has paid it, as evidence against the rest; but

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such is not the common course, nor does it, from its frequency, give rise to a presumption. It just as frequently happens that the bond is delivered up, in the absence of the rest who have paid their proportion, to him who extinguishes the debt by payment of the residue; so that no presumption arises more favourable to the one state of things than to the other. If the original joint indebtedness had been disputed, the production of the bond would have been an indispensable part of the plaintiff's case: but as that was admitted, it is impossible not to see that the object of the evidence was to prove that the whole debt had been paid by the plaintiff; to do which the naked fact that he was in possession of the bond, was plainly incompetent.

Error is assigned also in the admission of declarations by the obligee. It is answered that these were competent because they were made, not only in the presence of the defendant, but after he had consented to be bound by whatever the obligee should say. A party *is to be affected by the assertion of a third person only on the ground of assent either tacit [*480] or express, to the truth of the fact asserted. But where it appears from the offer of the party proposing the evidence the other was entirely ignorant of the state of the fact, much more when he expressly denied its existence, the foundation of its admissibility fails. In such a case the whole is to be rejected. But where the degree of his knowledge or assent is uncertain, the court may undoubtedly refer the decision of the preliminary facts to the jury by putting the whole to them with suitable instructions. The application of this principle to the circumstances of the present case, might be attended with difficulty; haply we are relieved from it by the legal effect of one of those circumstances, which, on another ground, seems to be decisive. It was testified by two witnesses that the defendant had consented to submit the disputed fact to the dictation of the obligee, whose consequent declarations in the presence of the parties convened with a view to an amicable adjustment, are the subject of this bill of exceptions. A party may undoubtedly assent beforehand to the truth of whatever another shall declare, and though a declaration on the foot of such assent be not conclusive of the fact, it is clearly competent to go to a jury. In particular circumstances the response of a third person to whom the parties had appealed, has even been deemed conclusive. *Starkie Ev. part IV. 42.* The application of this principle to the case before us, is obvious and direct. To one witness the defendant professed an entire willingness to abide by the decision of the obligee; and to another his readiness to contribute his share if the obligee would say the whole had been paid by the plaintiff. After that, can we doubt the competency of the

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answer thus invoked? As against himself, a party may undoubtedly give to the representation of another, a credit which it would not otherwise have; as was done in *MacLay's Lessee v. Work*, 10 Serg. & Rawle, 194. It is no objection here, that the obligee might have been called to testify under the sanction of an oath. By adopting his answer beforehand, the defendant had made it his own; and though it was open to proof of *mala fides* or mistake, it lay on him to furnish the evidence necessary to the purposes of contradiction or explanation. It was the business of him, therefore, and not of the plaintiff to produce the obligee. In an action not founded on a special promise to pay whatever a third person shall pronounce to be due, I am unprepared to say the representation of such third person is conclusive; but as evidence of the fact in dispute, it is undoubtedly competent to go to the jury. The naked fact of possession of the bond was, however, improperly admitted: and the judgment is reversed on that ground.

HUSTON, J.—If two are jointly indebted by bond, and one pays all, he may have *assumpsit* against the other for his proportion—this generally—but if two sons are bound to their father in a bond payable at a distant period, and that bond is [*481] expressly payable to the *father only, and to no other person, and one of the sons pays this bond several years before it comes due, it is not so clear that he can in all cases and in all events recover from his brother—evidently the bond in question was not intended to be enforced unless by the father. I would say, if he did not collect it, or at least sue on it, no one else could.

The declarations of the father, in my opinion, were not evidence, because, although Thomas said he would submit to be governed by what his father said, yet Charles never agreed to be so bound; and because the father never was told that the sons had agreed to submit their dispute to his statement of facts. If it is possible that any suit shall be settled in such way, it must be where both agree to be bound; and where the person whose statement is to decide the matter, is apprised of the agreement, and of the importance attached to his statement. It never can be that expressions used in a casual conversation, or in a dispute with a third person, or one of the parties, can come within the meaning of the agreement. I do not much like the cases cited on this subject; to make them at all consistent with reason, the person whose words are to settle a suit should be apprised of the necessity of stating the truth, the whole truth, and nothing but the truth, exactly as if giving testimony on oath.

The declarations of the father that he had received satisfac-

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tion, are according to our decisions, evidence against the father, or those claiming under him, because against the father's interest ; but the declarations of the father many years after the bonds were given up as to who paid them, are not evidence ; they are not within the reason of the rule ; it does not affect the father's interest whether they were paid by one son or the other ; he has no more interest in a contest between his sons than a stranger would have, who stood by and saw the money paid ; and in my opinion his declarations are no more evidence, than would be those of such stranger.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 6 W. & S. 240.

Cited by the Court, 9 Wr. 128.

*[PHILADELPHIA, MARCH 30, 1832.]

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Burkelow *against* Maurer *et al.*

The true construction of a clause in a deed giving to the grantee certain privileges in an alley between the messuage conveyed, and the messuage on the adjoining lot, "so long as the said two messuages stand and remain as they now are, or until the owners of both lots mutually agree to alter the buildings," when certain alterations are to take place in the alley, is not, that the grantee or those claiming under him shall not repair, but that he shall not rebuild ; and an alteration of the messuage of the grantee by the addition of a story and a new roof, without affecting the state of things previously existing in relation to the alley, is not repugnant to the provisions of the deed.

ERROR to the District Court for the city and county of *Philadelphia*.

This was an ejectment brought by the defendants in error against Isaac Burkelow, the plaintiff in error, to recover two feet one inch and a half of ground, subject to an easement.

On the trial below, the plaintiffs proved that Conrad Rohrman, under whom both parties claimed, formerly owned two adjoining lots situate on the south side of Green street, containing together in front forty feet two inches. In 1801 his executors granted the western lot to Jacob Burkelow, under whom the defendant held, containing twenty feet one inch in front. At the time of this conveyance there was erected on the lot granted, a frame building, on the lower story of which there was nineteen feet two and a half inches in front. After being carried up with this front to the height of about nine feet, it then widened its front to twenty-two feet, two and a half inches, and projected three feet over an alley. There was also erected on the other

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lot then belonging to Rohrman's estate but since conveyed to Maurer, a frame building of sixteen feet nine inches in front. There was too at this time and still is, an alley or way of three feet seven inches in width, running southward from Green street, between the said two buildings, and free ingress, egress, and regress, into, through, out of and along the said alley, and privilege of the water course therein, in common with the owners and occupiers of the adjoining messuage on the east, were granted to Jacob Burkelow, his heirs and assigns, "so long as the said two messuages stand and remain as they now are or until the owners of both lots mutually agree to alter their buildings, when an alley of three feet wide and of at least nine feet high in the clear, by thirty-five feet in depth, shall be left open equally out of and between both adjoining lots for the accommodation of the owners and tenants thereof."

In 1809, Rohrman's executors conveyed the eastern lot to John Maurer in fee, under whom the plaintiffs below held with the right and privilege of the alley as then left open and used between the two messuages, and free ingress, egress, &c., in precisely the same language as is used in the deed to Jacob Burkelow.

Witnesses were then called to prove that the defendant had [*483] altered *his house. The testimony showed that the alteration consisted in taking off the old roof which was leaky and required a new one; putting on a new roof and raising the house somewhat, front and back, whereby the garret was enlarged. There was a double pitch to the old roof, which was altered to a single one. Maurer, too, it was proved, had altered the pitch of his own roof. No additional floor was laid, no timbers repaired, and the lower part and foundation of the house were not changed or repaired, and the alley remained entirely unaffected by the alteration. The house projected before the alteration exactly as it did afterwards, and the new addition did not project over Maurer's ground at all, but receded from the line.

The court charged the jury that the additional raising of the defendants' house and putting a new roof on it, altered the said building although its foundation remained unchanged, and that therefore the two buildings did not now stand and remain as they were at the time of the conveyance to Burkelow, and the verdict of the jury must be for the plaintiffs.

The plaintiff in error assigned as error the charge thus given to the jury.

J. Norris and *D. P. Brown* for the plaintiff in error.

Keemle for the defendants in error.

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PER CURIAM.—The true construction of the clause on which the question turns, is not that the grantee or those claiming under him, should not repair without giving a right to confine him to the bounds ultimately assigned him, but that he should not rebuild. To produce that consequence an alteration of the whole house to the foundation would be necessary, and the court therefore erred in supposing it to be produced by the addition of another story and a new roof.

Judgment reversed and a *venire de novo* awarded.

[PHILADELPHIA, MARCH 30, 1832.]

Mifflin, Assignee of Wistar and Another, Creditors of
Mifflin, *against* Rasey and Wife, Executors of Hill.

A judgment given by one of two joint assignors of real estate for the benefit of creditors, to the other, prior to their assignment, must be postponed to the debts provided for by the assignment, though the judgment has been subsequently transferred to one, who, with notice of the assignment, paid value for it.

THIS case came before the court on exceptions filed to the report of an auditor appointed to distribute the money arising from the sale of the real estate of John Hill, deceased, the defendant's testator, under a mortgage given by him to John F. Mifflin, upon which a *scire facias* was sued out by Sarah Mifflin, assignee of the executors of the mortgagee. The [*484] fund to be distributed was the balance which remained after satisfying this mortgage.

It appeared that John Hill died in the year 1812, leaving a widow, Letitia Hill, and three children, viz., Martin, William, and John.

On the 19th of December, 1816, judgment was entered in favour of Letitia Hill against William Hill for four thousand dollars upon a bond by virtue of a warrant of attorney.

On the 28th of August, 1818, Letitia Hill and William Hill assigned the premises in question to trustees, their executors and administrators in trust to pay out of the rents and profits thereof certain creditors therein named, the amount of their respective debts; the assignment to be null and void after the payment of those debts, and the premises assigned to revert to the assignor.

The trustees entered into the premises and continued to receive the rents and pay the creditors until the sale of the premi-

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ises under the mortgage above mentioned, which took place in the year 1831. The first class of creditors had then been paid in full, but the others had received nothing.

In the year 1821 the judgment of Letitia Hill against William Hill was revived by amicable *scire facias*, and in the year 1826, another *scire facias* issued upon the same judgment in the name of Letitia Hill for the use of Martin Hill, but no other evidence of Martin's interest in the judgment was produced. These *scire facias* of 1821 and 1826 were not served on the trustees or any other person than William Hill, the defendant, and judgment was entered against him for want of an appearance.

Under the judgment obtained in the *scire facias* last issued, "the right, title, and interest" of William Hill in the premises was levied on and sold by the sheriff and purchased for the sum of twenty-five dollars by Martin Hill, to whom the sheriff acknowledged a deed on the 10th of March, 1828.

Martin Hill had previously purchased all his brother John's interest in the premises, at sheriff's sale, for the sum of one hundred and seventy dollars. No claimant appeared before the auditor for the interest of John Hill, except Martin Hill.

The auditor reported, "That the judgment of Letitia Hill of the 19th of December, 1816, being anterior to the assignment and regularly kept alive to execution and sale, was a lien, overreaching the assignment, and is entitled to be paid to the exclusion of the creditors under the assignment."

To this report of the auditor the creditors excepted :

First. "Because the judgment was not a lien regularly revived, so as to entitle Martin Hill to receive the proceeds in court that would be coming to William Hill.

Second. "Because any enforcement of the judgment by Letitia Hill or Martin Hill, having notice, would be a fraud on the creditors under the assignment.

[*485] **Third.* "Because the trustees of Letitia Hill for the payment of debts are entitled to receive whatever is set apart by the auditor as the interest of William Hill in the moneys in court."

These exceptions were argued by *Purdon* for the creditors, and by *Arundel* for Martin Hill.

The opinion of the court was delivered by

GIBSON, C. J.—An assignment to trustees for payment of debts, passes the whole interest of the assignors, whether joint or separate, actual or contingent. The judgment of Letitia Hill v. William Hill, even in the hands of one who had paid

[Mifflin v. Hill.]

value for it, is therefore not entitled to take precedence of their joint assignment, passing, as it did, every incidental or derivative interest necessary to impart to the fund its utmost power of productiveness. As regards a resulting interest after payment of the debts, if any such had remained, this judgment like any other security between the assignors themselves, would have remained unaffected ; but their creditors claiming by title paramount, are entitled to the utmost estate or interest which the assignors, or either of them, have in the property, so far as is necessary to the business of satisfaction. The exception to the report of the auditor in this particular, must therefore be allowed.

Decree accordingly.

Cited by Counsel, 27 S. 247, s. c. 1 W. N. C. 252.

END OF MARCH TERM, 1832.—EASTERN DISTRICT.

APPENDIX.

A few cases accidentally omitted in their proper places, are here introduced.

[CHAMBERSBURG, OCTOBER 17, 1826.]

The Commonwealth *against* The Commissioners of Huntingdon County.

MANDAMUS.

Where an indictment for perjury is returned "a true bill" and is afterwards quashed at the instance of the Attorney-General, and a second indictment for the same crime is returned "*ignoramus*, the costs to be paid by the county," the county is not liable for the costs upon the bill which has been quashed.

THIS was a rule to show cause why a mandamus should not issue commanding the commissioners of *Huntingdon* county to draw an order on the treasurer of said county for the payment of a bill of costs in the case of the Commonwealth *v.* Parkes.

It appeared that at January sessions 1822 of the Quarter Sessions of *Huntingdon* county, Parkes was indicted for perjury, and the grand jury found "a true bill." The indictment was continued until August sessions 1822, when it was quashed at the instance of the attorney-general. At the same sessions another bill of indictment for perjury was preferred against Parkes. The grand jury returned the bill "*Ignoramus*," the county to pay the costs.

Crawford, for the commissioners, stated, that his clients were willing and had never refused to pay the costs on the bill returned *ignoramus*, but they did not consider the county liable for costs on the bill which had been quashed by the attorney-general. He cited 1 Chitty C. L. 672; *Irwin v. Commissioners*

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of Northumberland County, 1 Serg. & Rawle, 505, 6 Laws of Penn. 229, note; Agnew v. Commissioners of Cumberland County, 12 Serg. & Rawle, 94.

Burnside, contra, referred to act of 23 September, 1791, sec. 11, 13, 3 Sm. L. 43; act of 20th of March, 1797, 3 Sm. L. 281; act of 8th December, 1804, 4 Sm. L. 204; act of 28th of March, 1805, 4 Sm. L. 235; act of 28th of March, 1814; Purd. Dig. 281; act of *29th of March, 1819, Purd. Dig. 53; Commonwealth v. Commissioners of Philadelphia County, 4 Serg. & Rawle, 541. [*488]

*The opinion of the court was delivered by

TILGHMAN, C. J.—This case comes before us as a rule on the commissioners of Huntingdon county, to show cause why a *mandamus* should not issue, commanding them to draw an order on the treasurer, for payment of costs in the case of the Commonwealth *against* John Parkes, in the Court of Quarter Sessions of Huntingdon county. It appears, that there were two indictments against Parkes: one in which a bill was found at January sessions, 1822, and quashed at August sessions, 1822, at the instance of the attorney-general; the other, sent to the grand jury at August sessions, 1822, and returned "*Ignoramus*, the costs to be paid by the county." The commissioners are willing, and have never refused to pay the costs on the *Ignoramus* bill, but contend that the county is not liable to costs on the bill which was quashed. The two bills are distinct prosecutions, and the grand jury could only say who should pay the costs on that which was before them; the question, therefore, of costs, on the bill which was quashed, must be considered without reference to the decision of the grand jury in that which was returned "*Ignoramus*." At common law, the commonwealth, or the county, are not liable to costs. It requires an act of assembly, therefore, to make them liable. But I think no such act has been shown on this occasion.

By the act of the 8th of December, 1804, (4 Sm. L. 204, Purd. Dig. 357,) in all prosecutions, cases of felony excepted, if a bill of indictment be returned "*Ignoramus*," the grand jury shall decide whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittal by the petit jury, on indictments for the offences aforesaid, the jury shall determine whether the county, or the prosecutor, or the defendant shall pay the costs. But the present case does not fall within either of these provisions, because here was neither an acquittal by the petit jury, nor a bill returned *ignoramus*. The bill was found, and then the indictment quashed. It was contended that the

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case was embraced by the fee bill of the 28th of March, 1814, sec. 13; Purd. Dig. 281,) by which it was enacted, "That in case of a conviction, all costs shall be paid by the party convicted, but where such party shall have been discharged according to law, without payment of costs, the costs shall be paid by the county." But it is clear, that the latter part of this clause, by which the costs are thrown on the county, is confined to the case mentioned in the beginning of the same clause, viz., the case of a conviction. Assuming it as a principle then, that the county is not subject to costs unless made so by an act of the legislature, and no act to that effect having been shown in the present instance, I am of opinion that the rule to show cause, &c., should be discharged.

Rule discharged.

Cited by Counsel, 13 N. 283, s. c. 8 W. N. C. 501; 2 W. N. C. 343.

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*[PHILADELPHIA, MARCH 30, 1827.]

Carlyle *against* Cannon and Others.

Devise to "my nephew J. C. and his four children, and also to W. R. to be equally divided between them during their natural lives and afterwards to revert to the male heirs in a lineal descent of my nephew J. C., whose male heirs are only to possess my estate in tail, and their male issue who bears the name of C. forever." W. R. died before, and J. C. the nephew, after the testator. The plaintiff was the eldest son and heir of the said J. C. the nephew: Held, that the plaintiff took five-sixth parts as tenant in tail in remainder, and the one-sixth part of W. R. by way of executory devise, and upon the events which had taken place, was entitled to the possession of three-sixth parts immediately.

A devise of the third part of the proceeds of an estate, is equivalent to a devise of a third part of the estate itself.

THIS was an action of ejectment for three undivided sixth parts of certain houses and lots in the city of Philadelphia, in which a verdict in favour of the plaintiff had been entered at Nisi Prius, subject to the opinion of the court on the construction of the will of Alexander Carlyle. The facts agreed were, that William Renew, therein mentioned, died before the testator, and John Carlyle the testator's nephew after; and that the plaintiff is the eldest son and heir of the said nephew. The defendants were tenants under the surviving executor.

The following is a copy of the will, viz.:

In the name of God, Amen. I, Alexander Carlyle, of the city of Philadelphia, in the state of Pennsylvania, tanner, being far advanced in years, through the blessing of God favoured with tolerable health, and of sound mind and memory, but considering the uncertainty of life, and the certainty of death, do

[Carlyle v. Cannon and others.]

make and publish this my last will and testament, in manner following, that is to say:

First. I commend my soul to God, who gave it, through the mediation of our Lord and Saviour Jesus Christ; and my body I recommend to the earth, to be buried at the discretion of my executors hereinafter named; and in order that the division of my estate may be better understood, I think proper to make the following declaration, to wit: I was born in Castle-bank near Egglefeckan, about ten miles from Dumfries, in Scotland, which place I left when young, and served my time in England in the trade of a tanner, before I came to America.

Item. I give and bequeath to my sister Jane Renew, and her blind daughter Jane, one-third part of the net proceeds of all my real and personal estate during the natural life of the survivor of them, that is to say the one-third part of the interest of the whole of my real and personal estate during the time aforesaid.

Item. I give and bequeath to my housekeeper Margaret Alexander, of the city aforesaid, the house I now live in, being No. 81 South Fifth street, during her natural life, together with all the household goods therein at the time of my decease. And also I give and bequeath *unto Margaret Alexander [*490] one hundred dollars per annum during her natural life, the said one hundred dollars to be paid quarterly, during the time aforesaid, the same to be reserved out of my estate, by my executors for the purpose aforesaid.

Item. All the rest residue and remainder of my estate, real, personal, and mixed, of what nature soever, I give, devise, and bequeath as follows (excepting nevertheless the house which I have left my housekeeper Margaret Alexander, which is disposed of as hereinafter mentioned) to my nephew John Carlyle, the grandson of William Carlyle, and his four children, namely, John, William, Alexander, and Rachel Carlyle, and also William Renew, to be equally divided among them during their natural lives, and afterwards to revert to the male heirs in a lineal descent of my nephew John Carlyle, whose male heirs are only to possess my estate in tail, and their male issue who bears the name of Carlyle forever; so that my estate may remain entailed to the surviving male issue of my nephew John Carlyle forever.

Item. I give and bequeath at the decease of my housekeeper, Margaret Alexander, the house and lot which I have before bequeathed to her during her natural life, to my nephew Alexander Carlyle during his life, and after his decease to be equally divided, share and share alike among the other male heirs, during their respective lives forever.

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And further I give devise and bequeath all my personal estate, and the proceeds thereof, to be equally divided among the devisees agreeably to the provisions heretofore made, share and share alike.

Lastly, I do hereby nominate and appoint my nephew John Carlyle of the district of Southwark, Cordwainer, Thomas Dobson of the city of Philadelphia, bookseller, and Edward Lane of the said city, accomptant, and the survivor of them, executors of this my last will and testament, also to be trustees of my real estate in the city of Philadelphia, or elsewhere, to rent and dispose of my estate, real and personal in such manner as I have heretofore declared and provided, until my respective heirs shall arrive and take possession of said estate, or empower some others so to do with full power and authority to said executors to rent my estate or any part thereof as aforesaid, for any term not exceeding one year, and receive the rents, issues, and profits thereof.

In witness, &c.

The case was argued by *E. Ingersoll* and *Condy*, for the plaintiff, and by *Lowber* and *J. S. Smith*, for the defendants.

The opinion of the court was delivered by

DUNCAN, J.—In this ejectment the plaintiff claims to recover three-sixth parts of the premises: that is his original sixth part, the sixth part devised to his father for life, who survived the testator, and the sixth part devised to William Renew for life, who died in testator's lifetime.

He contends that had all the devisees for life survived the [*491] testator, *then on the death of the testator, he would have taken estate in a special tail male, there being an estate or estates of freehold to support the remainder to him, but by the death of William Renew in the testator's life, his sixth part must either fail, or go over by way of executory devise to the plaintiff; that John, the second of the name, (to distinguish him from his father,) took the whole in special tail by the devise to "my nephew John Carlyle, and his four children, namely, John, William, Alexander, and Rachel, and to William Renew, for their lives, to be equally divided amongst them, and afterwards to revert to the male heirs in lineal descent of my nephew John Carlyle, whose male heirs are only to possess my estate in tail, and their male issue who bears the name of Carlyle forever, so that my estate may remain entailed to the surviving male issue of John Carlyle forever." John the present plaintiff is the heir male of John the first, the nephew of the testator. *Mandeville's case* first settled that this would be a

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devise in special tail male, and the reasons are fully stated in Fearn, page 180 of the Philadelphia edition; for though the words heirs male of the body do not attach to the ancestor, but vest in the person answering the description of such special heir, they have a sort of equivocal or mixed effect; and though they give the estate to the special heir originally, and not through or from the ancestor, yet the estate which he so takes, has such a reference to the ancestor as to pursue the same course of succession, or the same estate of duration or continuance through the same heir, as if it had attached and descended from the ancestor. Here the testator expressly and in words limits it to the surviving male issue of his nephew John forever, which same male issue is the plaintiff; and there can be no good reason why the high constable of this good city, should not be indulged in the gratification of his family pride, equally with the proudest baron, and make what is very usual in his native country, Scotland, a Tailzie.

To prove the second position, and I think it does prove it, the same authority, page 525, is referred to, and relied on, and the authorities cited, prove the rule to be, that wherever a contingent limitation is preceded by a freehold, capable of supporting it, it is a contingent remainder, and not an executory devise; but it is possible that the freehold so limited may by a subsequent accident become incapable of ever taking effect at all, as by the death of the first devisee, in testator's lifetime, in which case if the contingency has not then happened, it is held that where such subsequent limitation could not vest at testator's death, that is at the time when the will is to take effect, it goes over as if it had been limited, without any preceding estate of freehold; in which case when the subsequent limitation could not vest at testator's death, it should enure as an executory devise, rather than fail for want of a preceding freehold which had never taken effect. But when the preceding freehold is once vested, no subsequent accident will make a contingent remainder operate as an executory devise. From these well settled principles, it follows *that plaintiff is tenant in tail in remainder of the five-sixth parts and takes the sixth [*492] part of Renew, by way of executory devise immediately, and on the events which have taken place, will be entitled to the possession of three-sixths immediately, unless there are other provisions in the will which postpone his right of possession. It is alleged that the trustees are to hold possession for the purposes of the will, to rent the whole, and pay over part of the rent to Jane Renew and her blind child, during their lives. This does not seem consistent with the intention of the testator. The trustees are empowered to rent and dispose of his real estate for

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one year, not exceeding that time, provided that the possession is to continue no longer than until his respective heirs shall arrive and take possession of said estate, or empower some one to do it for them. Here the plaintiff has arrived to take possession, and is entitled presently to the possession of three-sixths, except for the interception of the devise to Jane Renew, and her blind child. The devise of the one-third part of the net proceeds, in order to effectuate the intention of the testator, is equivalent to a devise of the estate itself, and the plaintiff is entitled at present, only to judgment for two-thirds of three-sixths of the premises.

Judgment for plaintiff.

Cited by Counsel, 3 Wh. 210; 5 Wh. 217; 6 Wh. 240; 8 W. 433; 1 C. 111, 250; 13 Wr. 340; 4 S. 168; 20 S. 157; 25 S. 92, 323; 30 S. 194; 3 N. 298, s. c. 4 W. N. C. 254.

Cited by the Court, 14 N. 396.

[PITTSBURG, 1827.]

M'Donald *against* Lindall.

IN ERROR.

The lien of a mechanic under the act of 17th March, 1806, and its supplements does not extend beyond the description of the property in the claim filed.

Where therefore a claim is filed against a building, and the lot on which it is erected, without more, the lien does not extend to the adjoining ground as appurtenant to the building.

A right of way from necessity extends to a single way. It is always from strict necessity and this necessity cannot be created by the party claiming the right. It never exists where a man can get to his property through his own land however inconvenient the way through his own land may be.

How far the concealment or not giving notice of a claim to land, or to a right of way through another's land, will prevent the subsequent assertion of such claim.

WRIT of error to the Court of Common Pleas of *Allegheny* county.

The opinion of the court was delivered by

HUSTON, J.—The plaintiff here, was plaintiff below, and brought this ejectment to recover part of lots Nos. 177 and 158, in the city of Pittsburg.

The facts given in evidence, and not disputed, made the following case:—William Hamilton in 1817, was the owner of lots Nos. 176, 177, 158, and 159, in the city of Pittsburg. The four

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lots adjoined, and formed together a parallelogram. The two first fronted on Front street, and the two last on Water street. Nos. 176 and 159 were exactly *opposite each other, and extended from Front to Water street. No. 177 [*493] adjoined No. 176, and No. 158 adjoined No. 159, and Nos. 177 and 158 were exactly opposite each other, and extended from Front to Water street. William Hamilton contemplated building a house for a tavern, and very extensive back buildings, stables, &c., and in 1817, contracted with Paul Anderson to erect all the buildings. The articles of agreement referred to a plan.—This plan called No. 1, was not produced; it was agreed that a great part of it was relinquished. The walls and roof of the house and a back building, were erected by Anderson. These were occupied and floored for a counting and warehouse by W. B. Foster, under a lease from Hamilton. The house occupied the whole front of lot No. 176 on Front street. The back building and a yard before it occupied the residue of lot No. 176, and also covered a part of Nos. 177, 158, and 159. From this building there was then no passage to Front street, except through the house, or over a part of lot No. 177, but the whole of lot No. 159, not covered by this building, was unbuilt on, and might in whole or part, have been used as a passage from this building to Water street.

Anderson on the 20th of February, 1818, filed his lien as hereinafter recited, and along with it, the articles of agreement before mentioned, with Hamilton, and his account. The articles referred to a plan, but no plan was filed. In fact, that plan is agreed to have been abandoned by both parties.

Soon after this lien was filed, M'Clurg obtained a judgment against Hamilton; Beldane another judgment, and Ansheets & Rham another. Anderson purchased these three which were next in priority to his mechanic's lien. After these, many other judgments were obtained by other creditors of Hamilton, who became totally insolvent, and died in 1820.

Anderson sued a *scire facias* on his lien as a mechanic, and obtained judgment and issued execution, on which he made a levy in these words,—“Levied on all the right, title, and interest of William Hamilton to a large brick warehouse fronting on Water street, joining John Kelly, and occupying a part of lots Nos. 176, 177, 158, and 159, subject to a ground rent of two hundred dollars.” A levy was also made on M'Clurg's (now become Anderson's) judgment on the four lots, in the words hereinafter recited.—

It was proved by Mr. Neville, then sheriff, that both these levies were made under the direction, and agreeably to the direction of Anderson and his attorney.

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No. 83 to August, 1822, was a *venditioni exponas* on the mechanics' lien judgment; the advertisement conformed to the levy, and on it a sale was made on the 6th of June, 1822, to Anderson, and a deed acknowledged 15th of August, 1822.

No. 85 to August, 1822, was a *venditioni exponas* on Anderson's judgment in the name of M'Clurg; the advertisement conformed to the levy, and on it a sale was made on the 10th of June, 1822, of lot No. 159, to Anderson, for three hundred and [*494] fifty dollars; and of lot *No. 177 for five hundred and sixty dollars, and of lot No. 158 for four hundred dollars, to John M'Donald the plaintiff. Deeds were executed and acknowledged to the purchasers the 17th of August, 1822. It was proved that Anderson was present and directed the sale, and the order in which the lots should be sold; that he bid for each of the before-mentioned lots at the sale, and bought one, viz., 159: That during this time, he made no mention of any claim to any of the before-mentioned lots;—but when lot No. 176 (covered by the house and back building and a fenced yard) was set up, he refused to bid, and said it was his own already.—I shall recur to the testimony on this point again. Anderson called on the sheriff to return his writs: the money was paid; Anderson claimed it on his judgment before mentioned:—The court ordered it to be paid first to a ground-rent, and after, according to priority of lien, and Anderson got it,—whether on his mechanics' lien or judgment did not appear.

Soon after Anderson claimed the whole of lots Nos. 177 and 158, as well as Nos. 176 and 159, by virtue of the sale to himself on the mechanics' lien. M'Donald brought an ejectment, and the jury found a verdict in these words: "We find for the plaintiff the western part of lots Nos. 177 and 158, bounded by Water street and by lot No. 178 and lot No. 157 and Front street, up to a four feet wide alley running through from Water street to Front street as marked on the diagram filed; the alley to be forever in common between the parties; with six cents damages, and six cents costs, and for the residue we find for the defendants."

This verdict and the charge of the late President of the Common Pleas, which was repeated by the President on the present trial, are thus necessarily noticed here. Judgment was entered on that verdict. The present suit is brought to recover the whole of the alley and eleven feet on the eastern side of it, being part of lot No. 158, which by the former verdict and judgment, were given to Anderson.

Many points were raised and discussed during the argument, not necessary to be decided, and which therefore we do not de-

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cide. The acts of assembly under which this question arises, have been extended to many parts of the state. Many questions have arisen, and more will arise. When a point arises directly in a cause, it may be expected it will be more fully considered by the counsel, than when it is started incidentally and is not material to the cause trying.

The doctrine of what passes as an appurtenant, and of a way from necessity, and the effect of a sale by one, or in the presence of and for the benefit of one who claims a right in the property sold and conceals such claim from the purchaser, must, to a certain extent, be considered. Strictly speaking, land cannot be appurtenant to land, or to a messuage, of which land, being the *substratum*, is the principal part in the consideration of law. But so long ago as the time of Plowden, it was decided that the intention of the parties, and the meaning in which words were used, should govern, and that the expression "appertaining to the messuage" shall be taken in the sense *of "usually [*495] occupied with the messuage," and where the quantity of land is mentioned, is good in a plea, &c. Plowden, 85, 171, b. The word messuage, or the word appurtenant, are not used in the lien filed, the levy, or advertisement. The words are "all the right, title, interest, and claim of William Hamilton to the large brick warehouse fronting on Water street, joining property of John Kelly, and occupying part of four lots, Nos. 176, 177, 158, 159, subject to a ground rent of two hundred dollars." It is, however, contended, that as the back building is shut out from any passage to Front street by the house, a right of way to Front street passed as appurtenant to the house, and a right to all the land on the opposite side of the house and lying between it and Water street, and this last, although the owner of the house has purchased and owns the whole of lot No. 159, which lies between that building and Water street. A new house not yet finished, and of which it cannot be told what use it will be put to, can hardly be said to have any land usually occupied with it. It is true, while Foster occupied it as the agent for the Transporting Company, all that part of lot No. 159, and part of 158, lying between it and Water street, were used as a passage for wagons to and from it. This continued but a short time, and had ceased long before either the levy or sale, since which we do not know how it has been used. But the eleven feet of lot No. 158 given to the defendant, is not given as a way, so to be used in common; it is given absolutely to Anderson. If given as a way, the right of soil in fee would remain in the plaintiff, and if ever it becomes unnecessary as a way, *e. g.*, if the building had been pulled down by the owner and put up on Water street, the plaintiff

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might have built on this eleven feet. 1 Burr. 143; 1 Wilson, 107; 2 John. 313, 357. As it now stands, the defendant may cease to use it as a way, and may build on it. The right of way from necessity, over the land of another, is always of strict necessity, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That a road through his neighbours would be a better road, more convenient, or less expensive, is not to the purpose; that the passage through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land, that the right of way over the land of another can exist. How is this case? From Water street to this warehouse was the defendant's property, the whole breadth of lot No. 159, which is thirty-five feet. The jury then ought to have been instructed, that a right of way from necessity could not exist in such a case. It will not do on this ground to say, that using it as a warehouse, a six horse team could not come to the building and turn and go out on a breadth of thirty-five feet, and for the reasonable use of it as a warehouse more breadth was necessary, and the jury were to judge of what was reasonable. "So much of lots No. 158 and 177 as is covered by the warehouse, and as much more ground as you may deem necessary for the reasonable use of [496] the building," are the words of the first charge, under *which the jury gave fifteen feet, part of No. 158. This is adopted and repeated in the last charge on a trial in which the right to these eleven feet is in issue. The whole court agree that there was error in the charges, in directing the jury that they might give the fee of this eleven feet, part of lot No. 158 to the defendant. See 2 John. 357.

How far the words of the description in the lien filed can go, in affecting property, contiguous to, and not covered by the building, or whether the law, and it only, must decide the extent of lien where words would embrace more than the law gives, we do not now decide, or lay down as a general rule to extend to all possible cases, but as the lien is given for the security of the mechanic, and it is ordered to be filed as notice of the claim to others, it would seem that the lien cannot extend beyond the description of the property in the paper filed; for as to property not within the description, it gives no notice. There was a plan referred to in the articles, which we have seen at the argument, but which was not filed with the lien. In the similar case of a mortgage, which described the property in words and referred to a plan, which plan embraced property not comprised by the words, and which plan was not recorded with the mortgage, the Supreme Court of the United States,

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have decided that only the lands described in the words of the mortgage pass. Those additional lots appearing only in the plan do not pass. 7 Cranch, 48.

The plan then referred to in the articles and the roads, passages, &c., which it exhibited, are out of the case. The lien mentions a lot and a building; it is confined to that lot and that building—and at farthest if there was an alley laid out and used from the back building along the end of the front house, to a right of passage along that alley.

A right of way from necessity only extends to a single way. That a person claiming a way from necessity has already one way, is a good plea, and bars the plaintiff. 3 Com. Dig. Chemin, D. 4.

There cannot then be a way from this back building to Front street and another to Water street.

In my opinion, the fact that Anderson owns No. 159, which extends from Water street, to the back building, would of itself preclude him from any claim to even a right of way over the lot of another on that side.

Admitting, however, what in my mind is inadmissible, that Anderson's lien might have entitled him to some parts of the adjoining lots, he has, if the witnesses are believed, precluded himself from all claim to them by his conduct. I know of no principle better settled, or the justice of which is more obvious, than that if at the time a sale is going on any person represents the right or the extent of the right to be in a certain way against him, the right shall be as represented—If then the jury shall believe, that Anderson on his executions on the judgments, directed the levy on lots No. 177, 158, 159, 176, that he was present at the sale; refused to permit a postponement of the sale; *directed the order in which in point of time the lots should be sold, first, No. 177, then 158, then 159; [*497] that he bid for each of these lots and purchased the last; that he made no claim of any title to any of these, but that when No. 176, was set up he did claim it and refused to bid for it; that he called for and got the price of the two lots parts of which are now in question, in my opinion it is contrary to every principle of justice and equity as settled in courts and in the minds of honest men, that he should get first the price, and then the lots; and if he cannot get the lots, he cannot any part of them, except what was expressly mentioned in his liens, levy, and sale on it, viz.: the part covered by the building, and I think the jury ought to have been so instructed. I do not consider Weidman's testimony as at all conflicting with that of the sheriff, and Brackenridge; the conversation he heard was while lot No. 176 was selling. The sheriff agrees with him, that Anderson

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gave notice of his claim to that. Now if that lot was sold last, Weidman and he agree, and Weidman does not contradict the sheriff's statement, that Anderson gave no notice of his claim to the other lots; of this too, it must be left to the jury to judge.

My own opinion is, that on his claim as filed, he had a lien only on lot No. 176, covered by the building, together with the building and such part of the other lot as was covered by it; that having a way, though an inconvenient one, through the front house to the back building, he had no right from necessity to any other way to it; that when he himself sold the adjoining lots, if any of them were essential to the more beneficial use of the building, he ought to have bought such; that having directed the sale of them, and received the price he cannot now claim them or any part of them, and that such direction ought to have been given to the jury.

GIBSON, C. J., and DUNCAN, J., concurred.

ROGERS, J., dissented.

Judgment reversed and a *venire facias de novo* awarded.

Cited by Counsel, 6 Wh. 188; 5 W. & S. 538; 8 W. & S. 469; 1 Barr, 221; 2 Barr, 314; 4 Barr, 65, 194; 11 H. 337; 8 C. 215; 1 G. 157; 5 Wr. 10; 11 W. N. C. 231.

Commented on by the Court, 2 Wr. 491.

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*[PHILADELPHIA, DECEMBER 18, 1831.]

COURT OF OYER AND TERMINER AND GENERAL GAOL DELIVERY.

The Commonwealth *against* Clue.

The court, even in a capital case, may discharge a jury, before verdict, in a case of absolute necessity; but mere inability to agree does not constitute such a case; nor does it arise from the illness of some of the jury rendering them incapable of continuing longer in a state of privation and restriction, without endangering their lives, if such illness can be removed by permitting them to have refreshments, and the court against the consent and prayer of the prisoner, refuse such refreshments, unless a majority of the jury agree to receive them, which they decline.

If a jury has been discharged before verdict, under such circumstances, the prisoner may plead them in bar of another trial.

JOHANNA CLUE had been indicted and tried for the murder of her husband before his Honour Judge King and his associates, holding a Court of Oyer and Terminer for the city and county of *Philadelphia*, in the month of April, 1831, when the jury not being able to agree, the court discharged them for the reasons which will be detailed hereafter. She was arraigned again for the same offence, at the present sessions of the court of Oyer and

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Terminer, held by the Chief Justice and Judge Kennedy, when she pleaded *autre fois acquit*; and also, "that on the said indictment, at the said Court of Oyer and Terminer and General Gaol Delivery on Thursday the 12th of April aforesaid, the said defendant in due form of law was arraigned and pleaded not guilty of the premises contained in the said indictment, and for her trial put herself upon God and her country, and was by the said Commonwealth in due form of law placed on her trial before a jury of the said country. And the said Johanna Clue further says, that on the 21st, 22d, and 23d days of April, aforesaid, the witnesses were examined in due form of law, before the said court and jury as well on behalf of the said Commonwealth as her the said defendant: That the counsel for the Commonwealth and the defendant then addressed the court and jury in due form of law: That on the evening of the 23d day of April, aforesaid, the court charged the jury relative to the premises contained in the said indictment as set forth and that the said jury then according to law retired to deliberate on their verdict: That on Monday the 25th day of April aforesaid, at ten o'clock in the forenoon of that day, the said jury came into the said court, and answered to their names and declared that they had not agreed upon their verdict, and that they did not think that they were likely to agree upon their verdict: That two of the jury, viz., E. Ferguson, and A. Hooten, then and there stated that they were unwell, and one of the jury, viz., E. Ferguson, then and there declared that if he were much longer confined in his present state of privation *his life would be endangered: That one of the jury, E. Ferguson, being duly sworn before the said court, [*499] declared that he was seventy-six years of age: That the health of him the said E. Ferguson was greatly impaired by an attack of illness from which he, the said E. Ferguson, had only been relieved about a month: That he the said E. Ferguson, from his peculiar state of privation and suffering was so ill and feeble, that he could not walk into court without assistance, and that he, the said E. Ferguson, firmly believed that if he should be compelled to continue on the said jury any further length of time under his then state of privation and restriction, the life of him, the said E. Ferguson, would be in danger., And Andrew Hooten, another of the said jury, being duly affirmed according to law, declared, that he was then quite ill: That he had been confined all the month of December, then next preceding, with bilious fever: That the effects of this attack still left his frame debilitated, and that he firmly believed that his health would be in danger by being kept longer on the jury, under his then state of privation and restriction, as ordered by the court: That the jury was then ordered by the court to with-

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draw to their room where they had been deliberating, and Dr. Joseph Klapp, a physician of great respectability, was then and there directed by the court to visit the said jurors who alleged that they were sick : That the said Dr. Joseph Klapp did so visit the jurors in their room, in the absence of the defendant and her counsel, and without their consent, and returned to the said court and being then for the first time sworn, did depose that he had attended the said E. Furguson about a month previous to the said time, the said E. Furguson having then a disease of the brain, and that the life of the said E. Furguson would, in the opinion of the said Joseph Klapp, be endangered by a continuance of his present state of privation and restriction, as it might produce a return of the disease. And the said Dr. Joseph Klapp, then and there further deposed as his opinion to the said court, that the life of the said Andrew Hooten was not in immediate danger, but that he was ill and that his health would be endangered if he continued to remain in his present state of privation and restriction. And the said Johanna Clue, further says, that at half-past twelve o'clock in the afternoon of the same day, the said court ordered the said jury to be brought into court, and the said jury being then and there asked if they had agreed upon their verdict, answered that they had not. And the said court, then and there, without and against the consent of the said Johanna Clue, ordered the said jury to be dismissed, the said court declaring then and there their opinion that a case of necessity for the discharge of the said jury, as contemplated by the Supreme Court of this Commonwealth, in the case of the *Commonwealth v. Cook*, had been made to appear. And the said Johanna Clue further says, that during all this time, viz., from Saturday, the 23d of April, from half-past ten o'clock in the evening of that day, until Monday, the 25th day of April, [*500] at half-past twelve o'clock in the afternoon of that day, the *said jury were kept by order of the said court without meat or drink, but had the use of fire and candles, and that during the trial the said jury were allowed to eat and drink. And the said Johanna Clue further says, that after the said jury had been without meat or drink for the space of twenty-four hours, the said court, then and there after asking the consent of the commonwealth, and the defendant, authorized the said jury to take some refreshment, if a majority of the said jury would agree to the same, but that a majority of the jury would not agree to the taking of such refreshment at that time, until the verdict was agreed upon, after which declaration the said court refused to grant permission to any one of the said jury to take any food or refreshment whatever. And the said Johanna Clue further says, that during the time of the privations and restric-

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tions of the said jury, the said defendant prayed the said court that the said jury, or any of them might take food and refreshments, and after the declaration of the said jurors, that they were sick, the said defendant then prayed that the said sick jurors might be allowed food and refreshment, all which said praying of the said defendant the said court then and there refused. And the said Johanna Clue further says, that she, the said Johanna Clue, now here pleading, and the said Johanna Clue in the said indictment last mentioned, is the same identical person," &c., &c.

To the defendant's first plea, the Attorney-General replied *nul tiel record*, and to her special plea he demurred.

Ash, Attorney-General, and *Jack*, for the Commonwealth.
Swift and *J. Randall*, for the prisoner.

The opinion of the court was delivered by

GIBSON, C. J.—It is not intended to treat the question presented by this demurrer, in the various aspects in which it has been viewed at the argument. The subject has been exhausted by several of the most learned and able judges of our country; and had we even the vanity to deem ourselves competent to shed new light on it, an attempt to do so would have been prevented by the press of business that has occupied our attention during the short period that has been afforded. But we have meditated no such attempt. Our object is not to produce new arguments to sustain or overthrow our own decisions, but to repose on them so far as they go, as all-sufficient and incontrovertible authorities. Haply the *Commonwealth v. Cook* covers the ground of the argument here; and on the authority of that case we mean to rule the present. Although its principles may not be in accordance with decisions in our sister states, and in the courts of the union, it is nevertheless, as regards Pennsylvania, the law of the land; and we submit to it without reluctance. By this remark I am far from wishing to intimate a doubt of its solidity. Sitting at the time in another court, I took no part in it; but had it been brought before the court in bank by reason of doubt or hesitation on the part of the eminent men by whom it was decided, it would with the exception of *an inadvertant expression [*501] of the Chief Justice, presently to be noticed, have received from me a hearty concurrence. The confidence I put in the soundness of their judgment is unshaken by anything discoverable in the decisions that have since been made. Why it should be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate, for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offence, I am at

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a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it, but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the constitution, is guarded by sanctions more imperative. But in those states where the principle has no higher sanction than what is derived from the common law, it is nevertheless the birthright of the citizen and consequently demandable as such. But a right which depends upon the will of the magistrate is essentially no right at all; and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules. I take it on grounds of reason as well as of authority, then, that a prisoner, of whom a jury have been discharged before verdict given, may, by pleading the circumstances in bar of another trial, appeal from the order of the court before which he stood, to the highest tribunal in the land. Nor do I understand how he shall be said not to have been in jeopardy before the jury have returned a verdict of acquittal. In the legal as well as the popular sense, he is in jeopardy the instant he is called to stand on his defence; for from that instant, every movement of the Commonwealth is an attack on his life: and it is to serve him in the hour of his utmost need that the law humanely adds to the joinder of the issue, a prayer for safe deliverance. The argument must therefore be, that he is not put out of jeopardy unless by a verdict of acquittal; and that to try him a second time, having remained in jeopardy all along, is not to put him in jeopardy twice. In this aspect, it must be obvious that the argument is an assumption of the whole ground in dispute. If the prisoner has been illegally deprived of the means of deliverance from jeopardy, every dictate of justice requires that he be placed on ground as favourable as he could possibly have attained by the most fortunate determination of the chances.

The *Commonwealth v. Cook*, then, establishes that the court may discharge the jury of a prisoner capitally indicted only in a case of absolute necessity, to constitute which, it is necessary that there be some other ingredient beside mere inability to agree. The additional ingredient on which reliance is placed here, was the supposed disqualification for further consultation of two of the jurors by extreme sickness, which it was believed endangered their lives. The facts which appear on the pleadings are these: the jury retired to consider of their verdict on Saturday evening at half past ten o'clock, and returned to the bar at ten o'clock in the forenoon of the Monday following, [*502] *declaring they were not likely to agree; and two of

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pressed a belief that if he were much longer confined in the state of privation in which he was placed, his life would be endangered. Being then sworn he deposed that he was seventy six years of age; that his health was greatly impaired by an attack of illness from which he had been relieved but a month before; that he was so feeble from privation and suffering as not to walk without assistance, and he firmly believed that if he were kept any further time in the state of restriction and privation in which he then was, his life would be put in danger. The other juror also testified that he was quite ill; that a bilious fever with which he had been confined a few months preceding, had left his frame debilitated; and that he firmly believed his health would be in danger were he longer kept in the state of privation and restriction in which he then was. A respectable physician who had been ordered to visit the indisposed jurors in consequence of these representations, deposed that he had attended one of them a month before in a disease of the brain; and that his life would be put in danger by his being retained in the state of privation and restriction in which he was then placed, as it might produce a return of the disease: that the life of the other juror was not in immediate danger; but that he was ill, and his health would be endangered, were he to remain in a state of restriction and privation. In consequence of this examination the jury were discharged at half past twelve o'clock of the same day, without the consent of the prisoner, and having been kept together during thirty-eight hours, without meat, drink, or refreshment. But previous to their discharge, and when they had been so kept together for twenty-four hours, the court, with the assent of the Commonwealth and the prisoner, ordered them refreshment, on condition that a majority of them would consent to receive it; but the refreshment so ordered was refused. The prisoner not only consented to the granting of food and refreshment at all times, but after the condition of the two jurors was made known, prayed the court to allow whatever should be necessary, especially to those who were indisposed. From the facts thus stated, it distinctly appears that the jury were kept without food or refreshment against the prisoner's consent; and that in consequence of the illness of two of the number occasioned by abstinence, and which might consequently have been removed by the administration of nourishment, they were discharged against her consent.

It is evident that the course pursued by the judge, was thought by him to be dictated by a passage in the opinion of the Chief Justice in the *Commonwealth v. Cook*; and it is but just to say, that viewing the matter as it was perhaps his duty to do, it is not easy to see how the result at which he arrived,

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could have been avoided. "But a case may arise," the Chief Justice had said, 6 Serg. & Rawle, 587, "in which a jury may find great difficulty in agreeing, and some of them may be so exhausted as to put their health in danger. No one can think for a moment that they are to be starved to death. God [*503] forbid that so absurd and inhuman a principle should be contended for. The moment it is made to appear to the court by satisfactory evidence, that the health of a single jurymen is so affected as to incapacitate him to do his duty, a case of necessity has arisen, which authorizes the court to discharge the jury." It is evident from this that the exhaustion of a juror from privation was viewed by the Chief Justice, as a case that might legitimately arise; and undoubtedly the supposition is consistent with principles that were applicable to trial by jury, in the earlier periods of the law. It is scarcely to be doubted that the original object of keeping a jury together without meat, drink, fire, or candle, was to extort the concurrence of those who would otherwise have withheld it; for though Sir Matthew Hale in his *Pleas of the Crown*, 297, declares that "men are not to be forced to give their verdict against their judgments," it is said in a curious note appended to the remark, that "it is not a force when any of the jurors are compelled to comply under the peril of being starved to death; for how can it be expected," demands the annotator, "that twelve considering men should in all cases happen to be of the same sentiments." It is certainly easier to answer his question, than assent to the truth of his remark. Originally, it would seem, refreshments were not allowed even by consent of the prisoner; and it was left to modern times, as is justly remarked by Mr. Justice Duncan, in the *Commonwealth v. Cook*, to allow them, at first by consent, and afterwards, by the inherent power of the court; so that the use of hunger as an instrument of compulsion, like many other matters, such as fining jurors for obstinately holding out, seems to have passed away with the darkness in which it was engendered. The ancient form of the tip-staff's oath indeed remains; but with the implied qualification of being controlled by the directions of the court, it affords an admirable security against abuses that would infallibly rush in were jurors allowed an unlimited license to receive refreshments at their pleasure, or through any other channel than the order of the court. Through that channel, a reasonable supply at the public charge, and in quantity so restricted as to guard against excess, is a matter not of indulgence, but of right, appertaining to the jurors, not as a body, but as individuals, and without being subject to the control of the majority. What was said by Chief Justice Tilghman, in the passage just quoted,

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was doubtless drawn from recollection, and used in illustration of the matter more immediately before the court. The application of torture, in order to force the conscience, was abhorrent to every feeling of his nature; and had the attention of that humane and excellent judge been drawn directly to the subject by the occasion, there is little hazard in affirming that the result would have been the adoption of a sentiment in accordance with that which is now expressed.

If then, the indisposition of the jurors was induced, without the prisoner's assent, and might have been removed, what was the course dictated by analogy from parallel cases? Undoubtedly to recruit their *forces by food and refreshment. [*504] If a juror be taken ill, says Mr. Chitty, 1 Cr. Law, 529, another juror may be permitted to attend him: and if it appear that there is a probability of a speedy recovery, he may be allowed proper refreshment. It is only in the absence of a probable ability to return to his duties, that a new panel may be ordered. There cannot be a doubt that the indisposition of the two jurors here, would have been speedily removed by appropriate nourishment; and their temporary exhaustion therefore was not an available ground to divest the interest which the prisoner had in the verdict. Her plea of *autre fois acquit*, has not been mentioned by the production of a sufficient record; but her other special plea is available in law, and we are of opinion that the demurrer be overruled. She is therefore discharged.

The prisoner discharged.

Cited by Counsel, 3 H. 469.

Commented on, 11 H. 16, and 5 C. 325.



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AGREEMENT.

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Where the board of managers of a turnpike company authorized two of their number (the plaintiffs) to borrow twelve thousand dollars of a bank for the use of the company, pledging the stock for its repayment, and the defendant, and several other members of the board entered into a written agreement to guarantee each one-twelfth part of that sum to the borrowers, if the stock should not be sufficient, and the money was borrowed accordingly, and applied to the use of the company, who set apart one thousand dollars to meet discounts, and the plaintiffs, after that sum was exhausted, continued to renew the note from time to time, paying the discounts and curtailments required by the bank, out of their own funds, until the whole was ultimately paid off:

Held, that the contract was an entire one; that the defendant's liability continued as long as the loan continued; that the plaintiff's cause of

action accrued when the whole of the money was paid, and that if suit was brought within six years from that time, the act of limitations was not a bar. *Jones v. Trimble*, . . . 381

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Though under the act of the 14th of April, 1828, supplementary to the act to compel assignees to settle their accounts, &c., it is necessary that an appeal to the Supreme Court should be filed at the next term after it is taken, yet if it be done during the actual session of the court, whether sitting by adjournment, or otherwise, it is in time. *Case of Kreider's Estate*, . . . 205

APPRENTICE.

An apprentice is not within the meaning of the act of the 14th of February, 1729-30, supplementary to the "Act for the preventing clandestine marriages," which prohibits clergymen and others from joining in marriage "indented servants," without the consent of their masters or mistresses. *Attenu v. Ely*, . . . 305

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1. Although what is necessary to the enjoyment of the thing demised, passes with it as an appurtenant, without express words, yet what is merely convenient does not. *Howell v. M' Coy*, . . . 256
2. Therefore, a lease of a piece of ground for a tanyard and bark-mill,

with the use of so much of the water of a stream as may be necessary for conducting the business, does not carry with it a right to the lessee to empty the contents of his tanyard into the stream, or to dispose of his surplus tan on the adjoining land of the lessor, *Ibid.*

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ASSIZE OF NUISANCE.

1. In assize of nuisance, a plea in abatement, that, pending the writ, and since the last continuance, the defendant had abated and removed the nuisance complained of, is inadmissible, and may be treated by the plaintiff as a nullity. *Sherer v. Hodgson*, 211
2. If the recognitors who are sworn in an assize of nuisance cannot agree and are discharged, the panel cannot afterwards be resummoned, and the whole of them sworn, to afforce the assize. *Maris v. Parry*, . . . 413
3. Nor can those who were not previously sworn, be sworn with a tales and take the assize, *Ibid.*
4. Nor can a writ be awarded commanding the sheriff to summon a new set of recognitors, *Ibid.*

ASSUMPSIT.

1. An action of *assumpsit* may be maintained against the assignee of land, subject to the charge of a widow's thirds, to recover the principal of such charge, by those entitled to it after her death, without an express promise to pay it on the part of the assignee; but the judgment must be entered so as to make the land only liable, and not the defendant personally. *Pidcock v. Bye*, 183
2. The legislatures of New Jersey and Pennsylvania having passed an act to incorporate a company, styled "The Communication Company," both states appointed the same persons commissioners, who constituted the defendants agents to obtain subscriptions to the stock, and agreed to give them one per cent. on the amount of the subscriptions they obtained. The plaintiff subscribed for

twenty shares of the stock, and paid the first instalment on each share. A sufficient number of shares were subscribed to entitle the company to letters patent from New Jersey, which were accordingly granted, but none were obtained from Pennsylvania. The plaintiff brought an action of *assumpsit* against the defendants to recover back the money paid by him on his subscription, which the defendants claimed to retain towards the payment of a debt due to them by the commissioners for services in relation to their agency:

Held, that the plaintiff was entitled to recover back the amount paid by him, deducting its proportion of all reasonable charges. *Hudson v. Wharton*, 390

AWARD.

See REFEREES.

BAIL.

The requisitions of the rule which declares, that in no case whatever shall special bail be entered, without twenty-four hours' notice in writing, specifying particularly the name, place of abode, and calling of the bail, must be strictly and literally complied with, and cannot, under any pretence whatever, be dispensed with. *Stevenson v. Kimber*, . . 272

BILL OF EXCEPTIONS.

A party who alleges error in the admission of evidence by the court below, must show in his bill of exceptions what the evidence was; otherwise the exceptions to it will be considered as waived. *Snowden v. Warder*, . 101

BURGLARY.

See CRIMINAL LAW, 1, 2.

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CORPORATION.

See LEGACY, 1, 2. TOWNSHIP.

1. An action cannot be maintained

against a corporation, by one, who, by their appointment, has acted as a judge and inspector of a corporation election, to recover indemnity for the amount of damages and costs, previously recovered against him by a corporator, for having fraudulently and maliciously refused his vote when offered; whether a promise of indemnity be considered as having been made before the election, or after it has taken place, and the plaintiff been sued or threatened with a suit by the aggrieved corporator. *Weckerly v. The Ministers &c., of the German Lutheran Congregation*, . . . 172

2. And the record of the suit brought against the plaintiff, by such corporator, is conclusive evidence, that the vote was fraudulently and maliciously rejected when offered, . *Ibid.*

COSTS.

Where an indictment for perjury is returned "a true bill" and is afterwards quashed at the instance of the Attorney-General, and a second indictment for the same crime is returned "*ignoramus*, the costs to be paid by the county," the county is not liable for the costs upon the bill which has been quashed. *The Commonwealth v. The Commissioners of Huntingdon County*, 487

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CRIMINAL LAW.

See COSTS. JURY.

1. Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town; though neither the prosecutor nor his family had ever lodged in the house, in which the crime is charged to have been committed, but merely visited it occasionally. *The Commonwealth v. Brown*, 207
2. In an indictment for burglary, it is

not necessary to charge the prisoner with having broken and entered the prosecutor's house with an intent to commit a felony therein, . . . *Ibid.*

CUSTOM.

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See FUNERAL EXPENSES. LEGACY, 4.

DEED.

See EVIDENCE, 4, 5, 7.

The true construction of a clause in a deed giving to the grantee certain privileges in an alley between the messuage conveyed, and the messuage on the adjoining lot, "so long as the said two messuages stand and remain as they now are, or until the owners of both lots mutually agree to alter the buildings," when certain alterations are to take place in the alley, is not that the grantee or those claiming under him shall not repair, but that he shall not rebuild; and an alteration of the messuage of the grantee by the addition of a story and a new roof, without affecting the state of things previously existing in relation to the alley, is not repugnant to the provisions of the deed. *Burke-low v. Maurer*, 482

DEVISE.

See ESTATE TAIL.

1. Testator, being the owner, in whole or in part, of four contiguous tracts of land, which were in part bounded by a water course, devised one of them, situate on the west side of the water course, to his son B. under whom the plaintiff derived title. To his son H. the defendant, he devised his "undivided moiety of certain four acres, called the 'saw-mill land,' together with all the rights and privileges thereunto appertaining." This undivided moiety of the four-acre tract had come to the testator with a privilege appertaining to it, of swelling the water back to the southern boundary of the land devised to his son B. By the same will, the testator gave to his son H., the defendant, the privilege of erecting a dam, at any point between the land devised to his son B., (the plaintiff's land,) and the land on the eastern side of

the creek, devised to another son I., with a right to dig a race through I.'s land. The defendant erected a dam across the creek within the limits mentioned in the last devise; and afterwards erected another dam, at a considerable distance below, for the use of "the saw-mill land," where there had many years before been a dam erected, but the use of which had been abandoned, at least thirty-eight years:

- Held, that the whole of the property in the water course under the testator's control, passed by these devises to the defendant: that having been used by him in part, by the erection of the first dam, no presumption could arise from lapse of time, of any release or extinguishment of his right to any other part of it, and that consequently he had a right to erect the second dam. *Nitzell v. Puschall*, . 76
2. Devise to "my nephew J. C. and his four children, and also to W. R. to be equally divided between them during their natural lives and afterwards to revert to the male heirs in a lineal descent of my nephew J. C., whose male heirs are only to possess my estate in tail, and their male issue who bears the name of C. forever." W. R. died before, and J. C. the nephew, after the testator. The plaintiff was the eldest son and heir of the said J. C. the nephew: Held, that the plaintiff took five-sixth parts as tenant in tail in remainder, and the one-sixth part of W. R. by way of executory devise, and upon the events which had taken place, was entitled to the possession of three-sixth parts immediately. *Carlyle v. Cannon*, . . . 489
3. A devise of the third part of the proceeds of an estate, is equivalent to a devise of a third part of the estate itself, *Ibid.*

DOMICIL.

M. a native of P. after an absence of seventeen years in S. A. returned to the U. S. with no purpose of resuming his foreign residence. He resided with his father; styled himself in an instrument as of P. and made a new contract for another foreign residence in A. for a limited time, Held, that the domicile of origin was revived; and that the new absence was for a special and temporary purpose, and without a view of indefinite resi-

dence, effected no change. *Case of Miller's Estate*, 312

DOWER.

A widow's claim to dower may be barred by her election, by matter *in pais*, to take a devise in her husband's will. *Heron v. Hoffner*, 393

EASTON, BOROUGH OF.

The Court of Quarter Sessions of Northampton county, has no jurisdiction in laying out roads within the limits of the borough of Easton. *Case of the road in the borough of Easton*, . 195

EJECTMENT.

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EQUITABLE DEFENCE.

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See EQUITY.

EQUITY.

See WAY, RIGHT OF, 2.

1. A plaintiff, who claims under an equitable title must do equity before he can recover in ejectment. *Werkheiser v. Werkheiser*, 326
2. Where, therefore, the defendant has acted with good faith, he is entitled to be reimbursed the money he has expended in perfecting the title and making improvements, but if he has acted *mala fide*, and endeavoured to defraud the plaintiff, he is not entitled to the benefit of this principle, or if he be entitled to anything, it is only to the balance, which may appear to be due after deducting the rents, issues, and profits during the time he enjoyed the land, . . *Ibid.*

ERROR.

See BILL OF EXCEPTIONS. REFEREES.

1. This court cannot, on a writ of error, judge of the regularity of an execution issued in the court below, where the question involves matters of fact, which do not appear on the record. *Richter v. Rittenhouse*, 273
2. Where the judge, who tried the cause, stated to the jury, that he thought they would agree, that un-

less those persons who were interested in the land, and sold it to J. W. consented, and most explicitly, that he should have it clear of all claim on account of the purchase-money, it would not be just or equitable, that he should have it so, the charge was held to be right, taken in connection with all the evidence given in the cause. *Chew v. Parker*, 283

ESTATE TAIL.

See DEVISE, 2.

Testator devised as follows, viz.: "I give to my son C. K. my message and plantation, situate, &c., which I had from my father, with the buildings, &c., with the rents, issues, to him during his natural life, and if he shall leave lawful issue, then to them, their heirs and assigns forever; but for want of such lawful issue, then it shall return to my son J. K.; and if he should leave no lawful issue after his decease, then to my next lawful heir, and to their heirs and assigns forever."

At the date of the will, the testator had another child, a daughter. C. K., the son, at the time the will was made had no issue, nor had he any subsequently until after the death of the testator:

Held, that C. K. took an estate tail. *Pazson v. Lefjerts*, 59

ESTOPPEL.

The presentation of a petition to the Orphans' Court, setting forth, that the petitioner's father died seized of the premises therein described, leaving a widow and seven children, and praying the court to award an inquest to make partition, &c., does not estop the petitioner from afterwards maintaining an ejectment for the same premises, and proving, that they were the estate of his mother, who was his father's first wife, and descended to him as her heir, to the exclusion of his brothers and sisters, the children of a second wife. *Werkheiser v. Werkheiser*, 326

EVIDENCE.

See BILL OF EXCEPTIONS. CORPORATION, 2. NEW TRIAL, 1. PAROL EVIDENCE. PLEADING, 1. PRACTICE, 2. WILL, 1, 2. WITNESS.

1. A covenant in a deed of partition

between A. & B. that they shall at their equal and joint expense, cause the canal or race through their respective lots from the dam, &c., to be widened and improved in the manner therein specified, and the race and head gates at all times forever to be kept in order at their equal and joint expense, does not render them jointly liable for work done to the canal, &c., by order of A. alone; and it is error in the court to charge the jury, that the covenant in the deed of partition, and the fact of the work having been done, were some evidence of a joint agreement on the part of A. and B. with the plaintiff to do the work. *M'Creedy v. Freedly*, 251

2. Nor are the declarations or admissions of A. without any authority being shown from B., to make a contract binding them both jointly, any evidence whatever of a joint contract, *Ibid.*

3. Nor are the circumstances of B. having been frequently at the place when the work was done, and having his agents there, while it was going on, and saying nothing to the plaintiff to induce him to believe, that he was to look to A. alone for payment, any evidence of B.'s liability, . *Ibid.*

4. Although a deed purporting to convey a title to land, cannot be given in evidence without some proof of title in the grantor, yet the rule does not apply in the same extent, to a deed containing merely an executory contract between the parties, for the future procurement and conveyance of a title to land. *Chew v. Parker*. 283

5. The plaintiff having given in evidence thirty-seven patents dated the 12th March, 1795, to J. P. for certain lands in the county of N. which were the lands in dispute, and a deed dated the 12th July, 1795, for the same lands from the patentee to J. W. and a deed of previous date, viz., the 17th March, 1795, for the same lands from the said J. W. to the plaintiff, without any evidence to show, that J. W. at that time, had any interest in them or any prospect of acquiring any, and without showing under what arrangement, J. W. obtained the subsequent deed from J. P. the defendant, with a view to show, that J. W. obtained the deed from J. P. in pursuance and fulfilment of articles of

- agreement, which he had entered into with W. P. and M. W. on the 11th September, 1794, prior to the deed from J. W. to the plaintiff, offered the said articles of agreement in evidence, stating that he should also offer in evidence bonds and a mortgage given in pursuance of the said articles of agreement: Held, that the articles of agreement were admissible in evidence to show the origin of J. W.'s connection with these lands; what his interest was before and at the time he conveyed them to the plaintiff, and the terms and conditions upon which he subsequently obtained the title by conveyance from J. P., *Ibid.*
6. A deposition of one, who, when it was taken, was not a party to or interested in the suit, but afterwards became so, is not admissible in evidence. But where the parties to a suit depending in this court, entered into a written agreement, "that the evidence which had been taken in the ejectment depending in the county of I. of B. C. v. J. B. and others, and also against C. D. shall be admitted to be read on the trial, saving all legal exceptions, which might have been made in those actions," it was held, that such deposition was admissible in evidence, though the action in which it was taken, was not then depending, but had been tried and determined before the date of the agreement; it appearing that the suit in which the deposition was taken, was the only ejectment that B. C. had ever brought against J. B. and others in the county of I. and the deposition offered the only evidence taken in that suit, *Ibid.*
7. Deeds, not shown to have any bearing upon the matter in controversy, are not admissible in evidence, *Ibid.*
8. The execution of a disputed specialty is fully proved by the production of the subscribing witnesses, who recognise their signatures, and remember the transaction, though neither remembers any formal delivery, and the positive evidence of another person present at the time. A failure of memory, on the part of the subscribers, is sufficient ground for introducing the other testimony. *Case of Miller's Estate*, 312
9. The declarations of a person while holding the legal title to an estate, that he was merely a trustee for another, who had paid the purchase-money, are admissible in evidence against those claiming under him, although he be, at the time such declarations are offered in evidence, in full life, within the reach of the process of the court, and capable of being examined as a witness. *Giblehouse v Stong*, 437
10. The mere possession of a bond by one of several co-obligors, is no evidence that he has paid the whole debt. *Craig v. Craig*, 472
11. Therefore, in an action by one co-obligor who alleged he had paid the whole debt, against the other for contribution, where the joint liability of the plaintiff and defendant was admitted, it was held to be error to permit the bond to be given in evidence by the plaintiff to prove that he had paid the whole debt, *Ibid.*
12. The declarations of a third person, as to a disputed fact, made in the presence of both parties, is evidence, though not conclusive, against a party who has consented to submit the fact to his decision; even where such third person is capable of being examined as a witness, *Ibid.*

EXECUTION.

See ERROR, 1. LEVY.

1. Whether, where an execution is levied upon all the goods and chattels of an inn-keeper, consisting of a variety of household and kitchen furniture, and, also, of a quantity of liquors and bar furniture, which are suffered to remain in his possession between thirteen and fourteen months before any step is taken to effect a sale, it retains its lien, *dubitat*. *The Commonwealth v. Stremback*, 341
2. If a plaintiff, after having levied an execution on personal property, directs the sheriff "to stay proceedings until further orders, the levy to remain," the lien of the execution is gone, as respects third persons, whether purchasers or execution creditors, if the object of the arrangement was a security for the debt; and it is of no consequence whether the execution be returned or not, or whether or not third persons had notice of it, *Ibid.*
3. R. issued an execution against V. and levied on personal property

While the levy was pending, V. made a general assignment to M. and N., who paid the amount of the execution to the sheriff, who paid it over to R., the plaintiff. R.'s attorney afterwards, at the request of M.'s attorney, but without the authority of R., assigned the judgment to M., who assigned it to O. Afterwards O.'s attorney directed the sheriff to levy on V.'s real estate. The sheriff returned no levy on the personal estate of V., but a levy on his real estate, which was afterwards sold under an elder judgment. After payment of prior incumbrances, there remained a balance in court which was claimed by O., by virtue of R.'s assignment to him: Held, that the payment to the sheriff by M. and N. was a satisfaction of the judgment; that no assignment of it by R.'s attorney, without his authority, could resuscitate it, and consequently, that O. the assignee, was not entitled to the balance of money in court. *Wood v. Vanarsdale*, . 401

EXECUTORS AND ADMINISTRATORS.

See INTEREST, 1. ORPHANS' COURT, 1, 2, 3, 4, 5, 6.

1. If the real and personal estate of a decedent are together sufficient to pay his debts, and leave a surplus to be distributed among his widow and children, the administrator is guilty of no misconduct in supplying out of the personal estate, the urgent wants of the widow and children, though that estate alone is not sufficient for the payment of the debts. *Billington's Appeal*, . . . 48
2. Where the estate of an intestate is considerably in debt, and debts to a large amount are due to it, which cannot be immediately collected, and the administrator does not appear to have retained money in his hands an unreasonable length of time, he is not personally chargeable with interest paid by him, on debts due by the estate, *Ibid.*
3. Where the administrator of an embarrassed but solvent estate, in the course of collecting doubtful debts by suit, is obliged to bid at sheriff's sales under judgments obtained by him, for lands of debtors who have nothing else to levy upon, in order to prevent a great sacrifice of the property, and it appears from all the

circumstances attending the transaction, that he purchased for the benefit of the family, and was considered by them as having done so, and they not only made no objection to what he had done, but when he offered either to keep the land and account for the price of it, or hold it as their trustee, they returned no answer to his proposal, they cannot afterwards treat him as a purchaser on his own account, and make him account for the price, provided he has, in making the purchase, acted with good faith and as a prudent man would have done in his own case, *Ibid.*

4. And if the administrator has, under an order of the Orphans' Court, sold a portion of the real estate of the intestate, partly on credit, more advantageously than it could have been sold for cash, and afterwards being pressed for money for the purposes of the estate, he disposes of some of the securities he has taken for the price, at a discount, he is not personally chargeable with the discount, if under all the circumstances, he promoted the interest of the estate by doing so, *Ibid.*
5. Counsel fees, and the expenses of the administrator in prosecuting suits, &c., for which no vouchers were produced, allowed under all the circumstances of the case, *Ibid.*
6. The fourth section of the act of 6th April, 1802, prescribing the mode of proceeding against delinquent supervisors of public roads and highways, does not extend to the executors of such delinquents. *Shronk v. The Supervisors of Penn Township*, . . 347
7. An administrator *de bonis non*, can claim nothing but the goods, &c., of the intestate remaining in specie, unconverted and unchanged at the time of the death of the original administrator. *Pott's adm'r, &c., v Smith and another*, 361
8. Therefore, an administrator *de bonis non*, cannot maintain a *scire facias* upon a judgment on an administration bond to recover a balance due from the original administrator to the estate of the intestate, . . *Ibid.*
9. *Quere*, whether the representatives of a deceased co-administrator, and co-obligor, can be made liable for the assets of the intestate, which came exclusively to the possession and management of his surviving co-ad-

ministrators and obligors, who settled an administration account charging themselves alone with the amount of such assets? . . . *Ibid.*

10. Testator appointed his wife and his two sons executors of his will, by which he authorized them, and the survivors and survivor of them his said executors, the better to enable them to pay his debts and legacies, and to make division of his estate among his residuary devisees, to sell and dispose of all or any part, of his real estate at public or private sale, &c. His widow did not join in making probate of the will and taking out letters testamentary, which was done by the sons. She did not appear before the register, or make or send to him any renunciation either written or verbal. It did not appear she was asked to join in proving the will and taking out letters testamentary, or that any notice was given to her of the time of its being done by the others. The other two executors agreed to sell a lot of ground, part of the estate of the testator, to the defendant, and a deed to him from the three executors was written, but the widow refused to execute it. A deed was afterwards executed by the other two executors and tendered to the defendant, who refused to accept it, saying at the time, that he had no money to pay for the property. An action of *assumpsit* was then brought against the defendant, in the name of the three executors, in which the declaration set forth the sale of the lot by the sons, two of the plaintiffs; that the defendant upon his contract became liable to pay them the price agreed upon, and concluded by assigning a breach in the non-payment thereof to the said two executors. After the trial of the cause in the court below, the widow signed and sealed a renunciation as executrix: Held, that the action could not be supported. *Heron v. Haffner*, . 393
11. Held, also, that the deed tendered by the two executors to the defendant, was not sufficient to vest in him a good title to the lot, . . . *Ibid.*

EXECUTORY DEVISE.

See DEVISE, 2.

FEIGNED ISSUE.

See ORPHANS' COURT, 7.

FEME COVERT.

See PARTITION, 2.

FIERI FACIAS.

See PRACTICE, 1.

FOREIGNER.

1. If a foreigner asks for a dividend of a decedent's estate, he must take it subject to the priorities, established by the law of the forum. *Case of Miller's Estate*, 312
2. *Qu.* If the assets had been taken away from the foreigner's own country by an irregular removal? . *Ibid.*

FUNERAL EXPENSES.

The estate of a testator is not liable for the funeral expenses of his widow. *Lawall v. Kriedler*, 300

HUSBAND AND WIFE.

See LEGACY, 3.

IMPLIED WARRANTY.

1. In all sales of goods there is an implied warranty, that the article delivered shall correspond in specie with the commodity sold, unless there are facts and circumstances to show that the purchaser took upon himself the risk of determining not only the quality of the article, but the kind he purchased. *Borrekens v. Bevan*, 23
2. Therefore, if the defendant sell, and the plaintiff purchase an article as blue paint, and it is so described in the bill of parcels, this amounts to a warranty, that the article delivered shall be blue paint, and not a different article, *Ibid.*
3. In order to sustain an action on an implied warranty in a contract for the sale of goods, it is not necessary that the plaintiff should, before bringing suit, redeliver or tender the article to the defendant, . . . *Ibid.*
4. Though the seller is answerable to the buyer that the article shall be in specie the thing for which it was sold, yet if there be only a partial adulteration which does not destroy the distinctive character of the thing, the buyer is bound by the bargain. And in doubtful cases the test seems to be, that the article shall be merchantable under the denomination affixed to it by the seller. *Jennings v. Gratz*, 168

INDICTMENT.

See CRIMINAL LAW, 2.

INFANCY.

An infant, who hires a horse to go to one place, but goes to another, and kills the animal by severe usage, may plead his infancy in bar of an action on the case for damages. *Penrose v. Curren*, 351

INSOLVENT DEBTOR.

1. The interest of a trustee of an insolvent debtor, in the debts of the insolvent, is exactly that of the insolvent himself, as they stood affected by countervailing equities, at the time of the assignment. *Krause v. Beitel*, 199
2. Where, therefore, a trustee brought suit against two administrators with the will annexed, to recover a legacy given to the insolvent's wife, it was held to be a good defence, that one of the defendants had actually paid a debt for the insolvent before his discharge, and had been sued for another debt, which he had since been compelled to pay, . . . *Ibid.*

INSURANCE.

The plaintiffs loaned in Philadelphia to the defendants, seventeen thousand dollars on *respondentia*, by the ship *Juniata*, at and from Liverpool to Canton, and thence to Philadelphia. No *respondentia* bond was executed at the time, as the shipment was to be made at Liverpool, and it was uncertain whether it would be in specie or goods, but it was to be given subsequently, and in the meantime, an agreement was made by the parties, that bills of lading outward at Liverpool for seventeen thousand dollars, if specie should be shipped, or for twenty thousand dollars, value of goods at par, if specie should not be shipped; ("in which case the lenders should only be liable to average and entitled to salvage, as if it had been a specie shipment;") and also, all bills of lading of the returns at Canton, should be assigned to the lenders, as collateral security for the bond to be given. The vessel sailed from Liverpool with seven hundred pieces of goods to the value of twenty thousand dollars, but without specie, and she was immediately afterwards

stranded and lost; in consequence of which, forty-five of the seven hundred pieces were totally lost, and six hundred and fifty-five saved, but in a damaged condition: Held, that the plaintiffs were not liable for the damage of the goods saved, but only for the part totally lost; the meaning of the agreement being, that they should be exempt from damage, as they would have been, if specie had been shipped. *The Delaware Insurance Com. v. Archer*, 216

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 2.

Interest cannot be allowed to an executor on the balance of his administration account, where the effect of it is to give him compound interest, which cannot be permitted under any circumstances. *Case of Joseph Walker's Estate*, 243

JUDGMENT.

See ASSUMPSIT.

1. The issuing and return of a *scire facias* under the Act of 4th of April, 1798, does not continue the lien of a judgment beyond the period of five years limited by the Act. *Vitry v. Dauci*, 9
2. The plaintiff must use reasonable diligence in prosecuting the *scire facias*, to judgment, by which the lien of the original judgment is continued for another period of five years, *Ibid.*
3. But if an appearance and plea should be entered to the *scire facias*, it seems the plaintiff would be entitled to a liberal share of indulgence, and perhaps the rule of *lis pendens* might be applied, . . . *Ibid.*
4. A judgement given by one of two joint assignors of real estate for the benefit of creditors, to the other, prior to their assignment, must be postponed to the debts provided for by the assignment, though the judgment has been subsequently transferred to one, who, with notice of the assignment, paid value for it. *Mifflin v. Rasey*, 483

JURISDICTION.

An alderman has no jurisdiction of an action to recover damages for a deficiency in quantity, on a contract for the sale of land. *Dean v. Lee*, 325

JURY.

1. The court, even in a capital case, may discharge a jury, before verdict, in a case of absolute necessity; but mere inability to agree does not constitute such a case; nor does it arise from the illness of some of the jury rendering them incapable of continuing longer in a state of privation and restriction, without endangering their lives, if such illness can be removed by permitting them to have refreshments, and the court, against the consent and prayer of the prisoner, refuse such refreshments, unless a majority of the jury agree to receive them, which they decline. *The Commonwealth v. Clue*, . . . 498
2. If a jury has been discharged before verdict, under such circumstances, the prisoners may plead them in bar of another trial, . *Ibid*.

LEGACIES.

1. A bequest to a corporation, not for its general purposes, but in trust for particular objects within the scope of its corporate duties, is good. *The Mayor, &c., v. Elliott*, . . . 170
2. Therefore, a bequest to the Mayor and Corporation of the City of Philadelphia, in trust to purchase a lot of ground, and erect thereon a hospital for the relief of the indigent blind and lame, and to manage and regulate the institution, &c., is a good and valid bequest to the Mayor, Aldermen, and Citizens of Philadelphia, for the purposes and upon the trusts declared in the will, . . . *Ibid*.
3. Testator, after giving certain portions of his real estate to certain of his children at a valuation, and declaring, that in case it was refused by all his children, it should be sold by his executors, and that all his estate or the value thereof should be equally divided among his ten children, naming his seven sons and three daughters, all three of which daughters were married women, proceeded, "and if one or the other of my children should depart this life, then his bequest or legacy shall come to the heirs of his body." Held, that the bequest to the daughters was not to their separate use, but passed to their respective husbands. *Krause v. Beitel*, . . . 199
4. Testator devised to his wife certain real estate, and "also, all his house-

hold goods and furniture, moneys, bonds, mortgages outstanding debts due and owing to him, and all other his personal estate of what nature or kind soever." He devised to trustees, for the use of his son, certain other real estate, and to the same trustees, for the separate use of his daughter, certain other real estate, declaring in his will that the husband of his daughter should not, in any event, nor by reason of any cause, ways, or means whatsoever, have any right, claim, or interest in his estate, in right of his wife or otherwise, nor receive any benefit or advantage therefrom. These devises and bequests disposed of the whole of the estate the testator then possessed. After the execution of his will, he acquired other real estate, and died indebted to various persons, without having republished his will, or made any codicil disposing of the real estate made after its execution: Held, that the bequest of the testator's personal estate to his wife, was not specific, and that there was nothing in the will which showed an intention to exempt it from the payment of his debts. and that consequently, it was to be applied to that purpose before the real estate acquired after the execution of the will could be resorted to. *Case of Sam'l Walker's Est.*, . . . 229

LEVY.

To constitute a good levy on personal property, it is not necessary, that an inventory should in the first instance be made of it, or that the sheriff should immediately remove the goods, or put a person in possession of them. If they are within the power and control of the sheriff when the levy is made, it will be good, if followed up within a reasonable time by his taking possession of them in such a manner, as to apprise everybody of the fact, that they have been taken in execution. *Wood v. Vanarsdole*, . . . 401

LIEN.

See EXECUTION, 1, 2. MECHANICS AND MATERIAL MEN.

LIMITATIONS, ACT OF.

See AGREEMENT.

MARRIAGE.

See APPRENTICE.

MECHANICS AND MATERIAL MEN.

1. The lien of a mechanic under the act of 17th March, 1806, and its supplements, does not extend beyond the description of the property in the claim filed. *M'Donald v. Lindall*, 492
2. Where therefore a claim is filed against a building, and the lot on which it is erected, without more, the lien does not extend to the adjoining ground as appurtenant to the building, *Ibid.*

MORTGAGE.

1. A sale by the sheriff of a part of mortgaged premises, under a younger judgment against one claiming title under the mortgagor, exonerates the land sold from the lien of the mortgage, though the mortgage is not yet due, and no default has been made. *The Corpor'n, &c., v. Wallace, &c.*, 109
2. In such case, the part of the property not sold by the sheriff remains liable for such proportion of the debt due on the mortgage, as should be rated to its comparative value with the whole property mortgaged, *Ibid.*

NEW TRIAL.

This court will not, on a motion for a new trial, reverse the judgment of the Circuit Court, for the rejection of testimony, which, if admitted, would not give the plaintiff a cause of action. *Howell v. M'Coy*, . 256

NOTICE.

1. It is sufficient proof of the delivery of a notice, that it was sent in a letter by the post, without proving that the letter was received; provided the delivery be on the day, on which the notice should be given. *Smyth v. Hawthorne*, 355
2. A duplicate original, or copy of a notice, is good evidence without notice to produce the original, . *Ibid.*
3. And where a written notice has been given, but no duplicate or copy kept, it is not requisite to give notice to produce the notice, *Ibid.*
4. Where a promissory note became due in New York on Saturday when it was protested, and on the follow-

ing Monday the notary inquired, where the defendant, who was the first indorser, resided, of a subsequent indorser, who only knew that he resided out of the city of New York, and went to a former holder of the note to obtain information, and on the following day notice of the dishonour of the note was sent through the post-office to the defendant in Philadelphia: Held, that the notice was sufficient to render the defendant liable, *Ibid.*

5. What is sufficient notice to an indorser of the dishonour of a promissory note, and what dispenses with notice, when it has not been given? *Ibid.*

NUISANCE.

See ASSIZE OF NUISANCE.

1. The erection of anything in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. *Howell v. M'Coy*, . . 256
2. The erection of a tanyard comes within the operation of this principle, provided it has the effect of corrupting and rendering unwholesome the water in the stream below, so as to be injurious to the other proprietors, *Ibid.*
3. The limitation of these principles, is, either where there has been an appropriation for a period of twenty years, which, in law, raises a presumption of right, or it arises from contract, *Ibid.*
4. One, who by a lease has a right to so much of the water of a stream, as shall be needful and proper for the supply of a tanyard, and the working of a bark-mill, and is bound to return all the water which he diverts for such purposes, over and above the quantity which should be necessarily used and consumed in conducting the business, without unnecessary and unavoidable loss, diminution, or waste, into the creek above a dam situated lower down the stream, has no right to return it polluted by admixture with substances of a poisonous or unwholesome nature, to the injury of the lessor, or those claiming under him, . . *Ibid.*

OCCUPANCY, ADVERSE.

See WATER POWER, 2.

ORPHANS' COURT.

See ESTOPPEL.

1. The original and all the supplementary accounts of an executor constitute parts of one whole, and taken together, contain an exhibit of the proceedings of the executor in relation to the estate; and although it may sometimes be expedient to file exceptions to the different accounts, as they are from time to time settled, yet it is unnecessary to do so, the whole being open to exceptions, until the final adjustment of the estate. *Case of Joseph Walker's Estate*, . 243
2. The Orphans' Court ought, therefore, on the final settlement of the estate, to examine into the subject-matter of the exceptions then filed to the preceding accounts, although the settlement of such accounts may have been duly published, confirmed *nisi*, and afterwards confirmed absolutely, in consequence of no exceptions having been filed within the time prescribed by the rules of court. *Ibid.*
3. It seems, however, that if the parties have been heard in the Orphans' Court, a re-investigation by that court cannot be required, except, perhaps, on a petition in the nature of a bill of review, which can only be necessary after the final decree. *Ibid.*
4. No appeal lies from the decree of the Orphans' Court to the Supreme Court, except upon the settlement of the final account of the estate, and upon the appeal, the Supreme Court may examine into the exceptions to the original and supplementary, as well as the final account. The appeal brings up the whole case for examination, *Ibid.*
5. What is a final decree of the Orphans' Court on an administration account, *Ibid.*
6. It seems, the Orphans' Court may make a final decree, so as to discharge the executor, although there may be outstanding debts due to the estate, but this should be done with great caution, and not without express notice at least to the legal representatives, *Ibid.*
7. Where this Supreme Court has any doubts as to the facts of a case, coming before it on an appeal from the Orphans' Court, it will direct an issue to try them; but it will refuse

to do so, where the parties have had abundant time to furnish the court with the necessary testimony, and the facts, from what appears to the court, are involved in no doubt, *Ibid.*

8. The regular confirmation by the Orphans' Court of an administration account, showing a deficiency of personal assets for the payment of the debts of the decedent, is a final settlement, within the meaning of the act of 1st of April, 1811; and authorizes the Orphans' Court to make an order for the sale of the real estate of the decedent, for the payment of his debts. *Rhoad's Appeal*, . . 420
9. If the question, whether or not a partition has been made, is presented to the Orphans' Court, as an incident to the principal subject before them, they must decide it; or they may, if they think proper, direct an issue to determine it, *Ibid.*
10. If the devisees of lands as tenants in common, make partition by agreement, and the portion of one of them be sold by order of the Orphans' Court for the payment of the debts of the testator, that court has power by virtue of the act of 1st April, 1811, to decree contribution by the other devisees, *Ibid.*

PARENT AND CHILD

1. Where a son continues with his father after he has arrived at full age, and is supported by him, without any contract to be paid for his services, but with a view to a provision by will, he cannot, in general, after the death of his father, support a claim against his estate, for a compensation for labour, &c. It must be a strong case to induce the court to listen to such a claim. *Case of Joseph Walker's Estate*, 243
2. And where the services were rendered at so distant a period as to be barred by the act of limitations, and a settlement appears to have taken place between the father and son, it is to be presumed, that all accounts between them were settled, and the son cannot afterwards, as his father's executor, take credit for such claim in his administration account, *Ibid.*
3. Still less can he do so, where it appears, that at the settlement, the claim was asserted by the son, and withdrawn on being objected to by the father, *Ibid.*

PAROL EVIDENCE.

1. Where, in a voluntary assignment for the benefit of creditors, provision was made for the payment of a note particularly described therein, the court permitted the assignor to be examined to prove, that at the time of the execution of the assignment, there was not in existence such a note as that described, but that there was a note answering the description in every particular, except that instead of being drawn by the assignor in favour of A, as stated in the assignment, it was drawn by A. in favour of the assignor, and discounted by the present holder for his accommodation, and that he intended to provide for the payment of that debt. *The Commercial Bank v. Clapier*, 335
2. Parol evidence is admissible to prove, that by the original contract for the sale of a lot of ground then inclosed by a fence, the whole was intended to be embraced, but that the vendor fraudulently omitted a part of it in the articles of agreement and deed subsequently executed between the parties. *Flagler v. Pleiss*, 345

PARTITION.

See ORPHANS' COURT, 9, 10.

1. When lands devised to several, as tenants in common in fee, have been appraised in separate lots by persons chosen by the parties, and the devisees enter into a written agreement, declaring that they have made a full and just partition thereof, according to the appraisement and allotment, and enter into and hold possession of the same, this is a valid and binding partition, notwithstanding the agreement contain a stipulation that the parties shall contribute equally to the payment of an existing claim upon a part of the estate, and a covenant that they shall before a certain day execute a deed of partition, or such other legal assurance, as maybe deemed necessary. *Rhoads's Appeal*, 420
2. An agreement by a *feme covert* making partition of her real estate, is binding, without a separate examination and acknowledgment; particularly if it be to her advantage, and not objected to by her, or those claiming under her, *Ibid.*

PARTNERS.

See PROMISSORY NOTE.

PLEADING.

See ASSIZE OF NUISANCE. INFANCY.

1. The plaintiff has a right to support his cause of action by proof of the facts stated in the declaration, whether they are sufficient in law to entitle him to recover or not; and this can only be prevented by a demurrer which admits the truth of the facts as set forth. If there be a defence, the defendant must avail himself of it, when the whole case is before the court and jury, by a direction on the law arising from the facts. *Howell v. M' Coy*, 256
2. In pleading in abatement the pendency of a former suit for the same cause of action, it is necessary to aver, that the former suit remained depending, and undetermined at the time of the plea pleaded. *Toland v. Tichenor*, 320

PRACTICE.

ASSIZE OF NUISANCE, 2, 3, 4. BAIL.

1. A *fiery facias* issued by the consent of the defendant after the expiration of a year and a day from the date of the judgment, and levied upon land owned by him when the judgment was entered, and upon which it continued to be a lien from its date until the levy, but which was conveyed by him within the year and a day, is regular, as against his alienee; there being no allegation or pretence by the party complaining, that any defence could have been made, if instead of an execution a *scire facias* had been issued. *Righter v. Rittenhouse*, 273
2. Such assent need not appear on the record or even be in writing, and it may be proved by the evidence of the defendant himself. *Ibid.*
3. As long as the defendant in a judgment is alive, a *scire facias quare executio non* may be served on him alone, without notice to terre tenants, where there are any. And in the event of the defendant's death, a *scire facias* is to be served on his executors or administrators, . . . *Ibid.*
4. If terre tenants, whose interests are at stake, know of any defence, the court, upon an application made by them in due time, will permit them to make it, *Ibid.*

PRESUMPTION.

See DEVISE, 1. NUISANCE, 3.

PRIOR APPROPRIATION.

See WATER POWER, 2.

PROMISSORY NOTE.

See NOTICE, 1, 2, 3, 4, 5.

The indorser of a promissory note cannot contest the right of a surviving partner to sue upon it as such, and call upon him to show the consideration he paid for it, or the manner in which it came into his possession, upon an allegation that it belonged to the deceased partner in his individual capacity, where it does not appear that the administrator of the deceased partner denies that the interest is vested in the plaintiff as surviving partner; and even if the note did belong to the deceased partner in his individual right, the presumption is, in the absence of proof to the contrary, that the plaintiff came honestly by it for a full and valuable consideration. *Smyth v. Hawthorn*, 355

PURCHASE-MONEY.

See ERROR, 2.

QUARTER SESSIONS.

See EASTON, BOROUGH OF. TOWNSHIP, 3, 4.

REFEREES.

An award of referees is to be set aside only for plain error in fact or law, and not for suspicion of error. *M'Calmont v. Whitaker*, 84

RESPONDENTIA.

See INSURANCE.

ROADS.

See EASTON, BOROUGH OF. EXECUTORS AND ADMINISTRATORS, 6.

SCIRE FACIAS.

See JUDGMENT, 1, 2, 3. PRACTICE, 3, 4.

SHERIFF'S SALE.

See MORTGAGE, 1, 2.

SUPERVISORS.

See EXECUTORS AND ADMINISTRATORS, 6.

TIME.

See APPEAL.

TOWNSHIP.

1. Although a township is not strictly a corporation, it is *quasi* a corporation, and as such may maintain a suit. *Shronk v. The Supervisors of Penn Township*, 347
2. It is no objection to the proceedings of the Court of Quarter Sessions upon a petition praying for the division of a township, that the petition asks for a division according to a line pointed out in the petition absolutely, and does not ask for any inquiry into the propriety of a division. *Case of Maccungie Township*, 459
3. Or that the order of the court authorizes the commissioners appointed by them to inquire into the propriety of making the division according to the prayer of the petitioners, without authorizing them to inquire in any wise, into the propriety of any other division line than that proposed, *Ibid.*
4. Or that the commissioners have divided the township according to the division line proposed by the petitioners and have not reported any inquiry or decision as to any other division, *Ibid.*

TRUSTEE.

See INSOLVENT DEBTOR, 1 2.

USAGE.

Evidence is admissible to prove, that by custom or usage, in Philadelphia, on the purchase and sale of cotton, the vendor shall answer to the vendee for any latent defect in the article sold, though there be neither warranty nor fraud on the part of the vendor. *Snowden v. Warder*, 101

WARRANT.

1. It is not necessary that the warrant of a county treasurer for the commitment of a delinquent collector of taxes, should show upon its face, that such previous proceedings were had under the act by virtue of which it was issued, as authorized the treasurer to issue it. Nor is it necessary that it should appear, that at the time and place mentioned in the warrant issued by the commissioners of the county to the collector, at which he was required to pay over the taxes collected by him to the treasurer, the board of commissioners were in ses-

sion, ready to make "abatement or allowance for mistakes" in the duplicate, or for "indigent persons" therein named and assessed, who were unable to pay, &c. *The Commonwealth v. Ruff*, 95

2. It is not necessary to the validity of such a warrant, that it should run in the name of "The Commonwealth of Pennsylvania." It may issue in the name of the county treasurer, *Ibid*.

WARRANTY.

See IMPLIED WARRANTY. 1, 2, 3.

WATER COURSE.

See DEVISE, 1. NUISANCE, 1, 2, 3, 4. WATER POWER.

WATER POWER.

1. The water power to which a riparian owner is entitled, consists of the difference of level between the surface where the stream in its natural state first touches his land, and the surface where it leaves it. It may be occupied in whole, or in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy for a period commensurate with the statute of limitations. *M'Calmont v. Whitaker*, 84
2. A right by prior appropriation, has regard to the quantum of water drawn from a stream, common to both parties, and not to the quantum of fall, *Ibid*.

WAY, RIGHT OF.

1. A right of way from necessity extends to a single way. It is always from strict necessity, and this necessity cannot be created by the party claiming the right. It never exists where a man can get to his property through his own land, however inconvenient the way through his own land may be. *M'Donald v. Lindall*, 492
2. How far the concealment or not giving notice of a claim to land, or to a right of way through another's land, will prevent the subsequent assertion of such claim, . . . *Ibid*.

WILL.

1. Where a paper contains the substance of a will, with the usual act of execution subjoined, though without the names of subscribing witnesses,

the fact that it has been thus found in the decedent's possession, ought, without actual publication, to be taken for *prima facie* evidence of its having been adopted as a testamentary act. *Barnett's Appeal*, . . . 15

2. Where, on the other hand, it is destitute of every formal act of authentication, the presumption ought to be adverse, in the absence of proof of actual publication, or any other act of recognition equally satisfactory, *Ibid*.
3. Where a paper was headed, "My last will and testament, &c.," the face of which was blotted and blurred, and indicated the first essay of a mind untried to method and arrangement, in which whole sentences were obliterated, and entire passages cut off, crossed out, and repeated with material variations, in addition to which the decedent began anew on a fresh leaf, to make, not a fair copy of what preceded it, but an entirely new draft varying from it in essential particulars, and this was left unfinished, it was held that it contained no sufficient intrinsic evidence of a testamentary intention, to entitle it to be admitted to probate as a will, *Ibid*.
4. Though a rough draft may be a testament, where the intent is clearly apparent, yet it is otherwise if it appear that the decedent viewed it as a mere outline to be filled up and completed by more detailed provisions; or that having viewed it at one time as complete, he had cancelled it, and used it as a memorandum for a new disposition, *Ibid*.

WITNESS.

See EVIDENCE, 9.

1. One of two plaintiffs in an action of *assumpsit*, brought by them as indorsees of a promissory note, after having, upon the trial, assigned all his interest in the suit to the other, who has paid into court all the costs of suit, may be examined as a witness for the plaintiff to whom he has assigned. *Hart v. Heilner*, . . . 407
2. If when a witness is offered, it be perfectly clear from the testimony given in relation to him, that he is interested, the court may reject him, as incompetent, but if his interest be in the least degree doubtful, the court should permit him to be sworn, instructing the jury, that if in their

opinion he is interested, they are to pay no regard whatever to his testimony, *Ibid.*

3. A. & B. brought an action of *assumpsit* against C., in which they declared upon an alleged agreement, that the said C., in consideration that they would enter satisfaction on two judgments which they held against him as administrators of D., for the purpose of enabling him to make a perfect title to one E. for a lot of land which C. had sold to him and which was bound by those judgments, promised to give to A. and B. a new judgment for the aggregate amount of the two judgments on which they at his request had agreed to enter satisfaction; averring, that confiding in the said promise, they did enter satisfaction, &c. Before the trial of the cause took place, A. died and his son

was offered as a witness to prove the agreement, after having executed to a third person, an assignment of all his interest in the suit and the money for the recovery of which it was brought, and offered to pay into court all the costs which had accrued and a sum sufficient to cover all which might thereafter accrue: Held that he was incompetent on the ground of interest, notwithstanding the assignment, &c., because in the event of the plaintiff's failure to recover in this suit, the estate of the witness's father A., of which he was entitled to a distributive share, would be liable to make good to those interested in the estate of D., of which he was one of the administrators, his proportion of the amount of the two judgments upon which satisfaction had been entered. *Kimball v. Kimball*, . 469



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